# Law Notes

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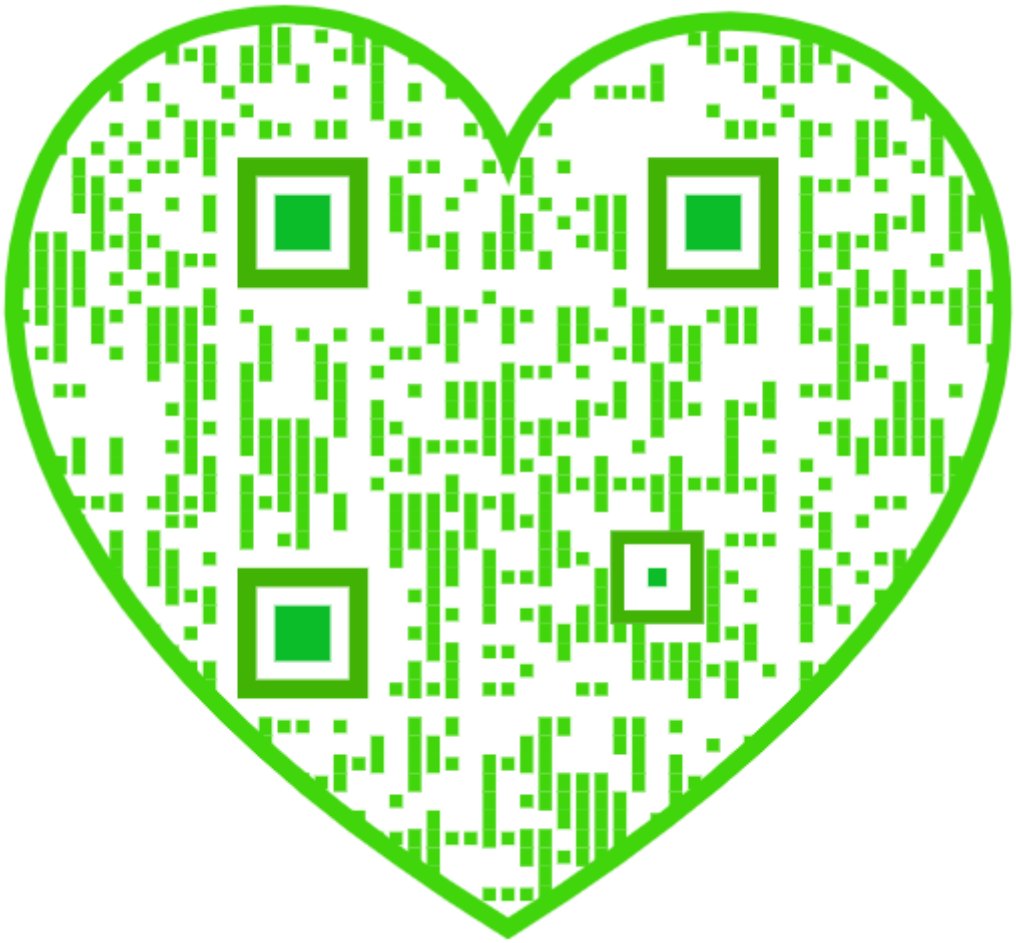

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# Law Notes

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*An index of the volume completed by the March number of* LAW NOTES *will be sent to subscribers on application.*

### The Lawyer's Exemptions.

EXPERIENCE has set its seal of approval on the words of Lord Abinger: "A barrister no doubt is in the situation of a gentleman, but still a barrister may sometimes be reduced in his circumstances." *Atkins* v. *Curwood,* 7 Car. & P. 756. Reference to the exemption in respect to his professional equipment which is allowed to a lawyer is therefore not wholly academic. The first impression from a reading of the cases is that the judges have not in this matter been overly generous to their less fortunate brethren who are denied a stipend from the public purse. According to a press report a case now pending in Montana involves the question whether the office typewriter (machine) of a lawyer is exempt from seizure on execution. The precise question seems never to have been decided. In *Massie* v. *Atchley,* 28 Tex. Civ. App. 114, the typewriter of a physician was held not to be exempt, the court being perhaps moved by indignation over a statement that it was used not only for correspondence but for "advertising." In *Abraham* v. *Davenport,* 73 Iowa 111, a lawyer's office furniture was held to be exempt as an "instrument" of his profession, the court saying: "The question presented is as to whether the ordinary office furniture of a lawyer necessary to enable him to carry on his business can, within the meaning of the statute, be deemed his instruments. We observe, for instance, that one of the articles attached is the defendant's office table. Strictly speaking, perhaps a table is not an instrument. Its general use is such that the word 'instrument' seems inapplicable. But it should be borne in mind that a lawyer's table is used specifically in his employment; it is one of the things which he employs as a means in the accomplishment of his work. The fact that a table, in its general use, is not an instrument, is not important. It appears quite different when it is adopted specifically as a means in an employment. It then fulfills all the essential ideas of an instrument." Under statutes exempting "tools" a lawyer's library is held not to be exempt. (*Lenoir* v. *Weeks,* 20 Ga. 596; *Brown* v. *Hoffmeister,* 71 Mo. 411; *In re Church,* 15 R. I. 245.) On the other hand such an exemption has been allowed under a statute which mentioned among other exemptions "books." (*Equitable L. Ins. Soc.* v. *Goods,* 101 Iowa 160; *Fowler* v. *Gilmore,* 30 Tex. 433.) In *Keiher* v. *Shepherd,* 4 Civ. Proc. Rep. (N. Y.) 274, a membership in a law institute maintaining a library was held to be exempt.

The prominent part which the legal profession plays in the formulation of legislation is well known. One of two conclusions is therefore inevitable. Either the lawyers have unselfishly forgotten their own interests in providing for others, or the profession has been so prosperous that the question of exemptions has not aroused the interest of its members.

### Unionizing the Profession.

CAN it be possible that the narrow class-conscious selfishness which is often manifested by labor unions is after all not a characteristic of the "lower classes" but is a manifestation of plain old human nature? Certain sporadic agitations of the bar in different localities bear a strange resemblance to those of their brethren who parade on Labor Day. In Montana it is reported that the State Bar Association is planning to present a bill giving to the Association the power to limit the number of lawyers in the state. Here we have the old crafts device of the limitation of apprentices applied to the profession. In Illinois the sixth district bar association has resolved to petition the judges to grant a shorter working day in the trial of cases; not the familiar eight hour day, but a six hour day, is their demand. Whether it will be enforced by a strike if the judges obdurately point to a mass of unfinished business on the docket is not disclosed. But one thing more is needed, the establishment of sabotage in legal practice. In *Drazen* v. *Curby,* 158 N. Y. S. 507, it appeared that a rule of a Building Trades Union provided that "any member who does an unreasonable amount of work" shall be fined, etc. Let the Bar Associations decree that no lawyer shall accept more than ten cases a year or win more than fifty per cent of them. Then there will be business enough to go around, the less skilful lawyers will not be discriminated against, and all will be merry as a union shop.

### Wife Abandonment as Felony.

AT a recent convention of the Illinois State's Attorneys' Association it was urged that wife abandonment should be made a felony instead of a misdemeanor. If a criminal regulation is to be enforced, it is apparent from

the nature of the offense that it must be one which admits of extradition. In an aggravated case the offense is one for which a severe penalty is deserved. But there must be very many cases which will fall within the terms of any law that can be drawn wherein no human tribunal can justly apportion the guilt. In Kansas, where such a law has been in force for some time, it has proved expensive and not very satisfactory. According to figures compiled by the clerk of the City Court of Wichita four cases in the present year have imposed on the county a cost bill of $300. Judge Pierpont of the same court says: "I believe that a large percentage of our wife desertions should be dealt with in the divorce court instead of here. If a wife won't live with her husband, the difficulty had better be settled through civil action. As it is, there is usually no satisfaction obtained, and the county generally has to stand for the costs of the criminal proceedings."

**Military Training as Involuntary Servitude.**

It has been suggested that the constitutional prohibition against involuntary servitude except as a punishment for crime invalidates statutes providing for compulsory military training. The point has never been decided directly, since no conscription or compulsory military service law has been passed since the adoption of the Thirteenth Amendment. It is not at all probable that any court would hold that the nation, by a declaration designed to free the negro slaves, had succeeded in hamstringing itself. In a case involving the validity of laws relating to seamen the federal Supreme Court in *Robertson* v. *Baldwin,* 165 U. S. 275, announced obiter a general rule adequate to cover the present issue. Mr. Justice Brown said: "The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words 'involuntary servitude' were said in the *Slaughterhouse cases,* 16 Wall. 36, to have been intended to cover the system of Mexican peonage and the Chinese cooly trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview."

The case in which the foregoing was said involved a status created by a voluntary act. But it is equally applicable to the relation of citizen and sovereign which is created by birth, like that of parent and child, in which latter case, if recollection serves correctly, certain involuntary servitude in the way of wood piles and water pails is occasionally imposed.

**Capital Punishment.**

Opposition to capital punishment seems to be steadily growing. The recent abolition of the death penalty in Arizona makes twelve states wherein lex talionis no longer prevails. In his last message to the legislature Gov. McCall of Massachusetts said:

"I urge you to pass legislation abolishing capital punishment. I believe that the principles of humanity and the scientific methods of penology both demand that it be done away with, and the experience of the States and nations which have abolished it warrant us in taking action."

A very curious situation has recently arisen in the state of Washington which has abolished the death penalty. A man has been sentenced to death in the federal court, and the question arises where the sentence can be carried out. It cannot be done on soil under the jurisdiction of the state, and the commandant of the military reservation near Spokane has refused to permit the hanging there. It is reported that the opinion of the Attorney General has been asked as to the legality of holding this impressive legal ceremony on the roof of the government building in Spokane.

The French have an epigram of typical aptness in defense of capital punishment,—"Monsieur the Murderer set the example." But an increasingly large minority are coming to the conclusion that it is possible for society to find a more worthy example to follow than that of "Monsieur the Murderer."

**Alternative for Capital Punishment.**

In most if not all the states wherein capital punishment has been abolished imprisonment for life has been substituted as the penalty for murder. Such a substitution loses sight of the main objection to the death penalty. The latter is usually assailed on grounds of humanity. It is barbaric enough, but as between hanging and life imprisonment the choice is largely a matter of individual taste. The really vital objection to both is that they are based wholly on the idea of punishment and exclude absolutely that of reformation. Any sentence which releases a man from prison before there is a reasonable probability that he will become a law-abiding citizen is too short. Any sentence which holds him in confinement after that time is too long. The crime which he has committed is no unfailing index to the time requisite to reformation. There are many crimes which indicate a moral depravity far deeper than the average homicide, and between the perpetrators of homicides of the same technical degree there are great moral differences. Borrowing an illustration from a distinguished penologist, take two murderers whom fiction has made familiar to all,—Bill Sikes and Don José. The former if released after twenty years in prison would have been ready for another murder at the first opportunity. The latter, his mad passion for Carmen burned out, could with perfect safety to society have been set at large at once. Between the universal death penalty of the past and the universal indeterminate sentence of the future, there is no logical stopping place.

**Judicial Idol Worship.**

Idol worship consists in paying reverence to the outward form and ignoring the indwelling spirit. There is a class of decisions which maintains just that attitude

towards the Constitution. Thus in *People* v. *Auditor,* 30 Ill. 434, it was said: "Private distress, great financial embarrassments, even a public calamity, are held by a just people as airy nothings when weighed against the high behests of the Constitution." With the correctness of the decision actually made in that case we have no concern. But if such a state of mind ever existed on the part of "a just people" it was a most unhealthy one. The Constitution was made for the people and not the people for the Constitution. It is a canon of statutory construction that an absurd result is presumed not to have been intended by the law makers. The highest respect that can be paid to the founders of the Constitution is to give them the benefit of the same presumption, instead of paying a superstitious reverence to the letter of their words and "smothering with their sacred ashes Freedom's new lit altar fires." As was well said by a Federal judge, "Legal institutions are built on human needs and are not merely arenas for the exercise of scholastic ingenuity." *U. S.* v. *Burdick,* 211 Fed. 492. Any person who reads the constitutional decisions of the last few years, especially those of the federal Supreme Court, and compares them with those of a generation ago cannot but see that a new era has dawned, bringing an increasing judicial recognition that the great problems of the present need for their solution all the light which the present has brought to us.

#### Newspaper Secrecy.

It is reported in the press that a circuit judge in Illinois has ruled recently that a newspaper cannot be compelled to disclose the source from which information published in the paper was derived. If the decision is correctly reported, it is certainly erroneous, no such privilege having ever been recognized in the law. See *Ex p. Lawrence,* 116 Cal. 298, *In re Grunow,* 84 N. J. Law 235, *People* v. *Fancher,* 4 T. & C. (N. Y.) 467. In *People* v. *Fancher, supra,* the editor of the New York Tribune was charged with contempt for refusing to disclose the name of the writer of a defamatory article, the information being sought for the purpose of indicting the author. The court said: "As the law now is, and has for ages existed, no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reason that the rules of a public journal forbade it. That some other party assumes the responsibility of a crime, and is willing to suffer its consequences, can never prevent an inquiry as to each and every person concerned therein, and the holding of all such equally responsible with the one avowing it."

Of course the obligation to disclose the source of published information cannot be enforced where the disclosure would incriminate the newspaper representative. *Burdick* v. *U. S.,* 236 U. S. 79. In that case a refusal by the city editor of the same energetic journal which figured in the Fancher case to testify as to the sources of his information as to certain customs frauds was sustained. The privilege even within those limits is not one to be encouraged. That the plea of self-incrimination in the Burdick case was a mere subterfuge to mask the claim of journalistic secrecy is shown by the fact that the proffer of a full pardon for all offenses connected with the matter under discussion was refused. On one hand the press claims a privilege to pry into private affairs for no other end than to cater to public curiosity; on the other it asserts a privilege of secrecy as to its own affairs even when the ends of public justice will be served by a disclosure. The contentions are alike impudent and unfounded, and have received but scant recognition in the courts.

#### Suspending Sentence.

The United States Supreme Court has recently passed for the first time on the much mooted question whether a trial judge has power to suspend sentence in a criminal case, holding that no such power exists. *Ex parte United States,* 242 U. S. 27. It is reported that since that decision Congress has passed an act conferring the power to suspend sentence, and this act has given rise to considerable discussion of the question of policy involved. Against its advisability, it is claimed that the proper administration of the criminal law is jeopardized by giving to every trial judge a power to pardon. That the power is capable of great abuse is self-evident. But power and the possibility of its abuse are inevitable concomitants. In many particulars which will readily occur to every observer the American Government has been hampered in its just activities by the reluctance to confer power lest it be abused. There is not a power which the government possesses which has not at some time been abused. Putting aside the possibility of abuse, the better view of public policy seems to favor the power in question. The argument was strongly stated by the judge whose decision was reversed by the supreme court in the case referred to. He said: "Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but, affecting its extent and character, we consider the effect of the situation upon the individual, as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies." After pointing out the peculiar aptitude possessed by a trial judge for the appreciation of such conditions, and the imperative duty which rested upon such judges to consider and weigh the matters stated, and to determine, as an inherent attribute of judicial power, whether a permanent suspension of the term of imprisonment fixed by the statute should be ordered, the circumstances upon which it was concluded that a permanent suspension should be directed were stated in part as follows: "We took into account the peculiar circumstances under which his crime was committed, having regard to the temptations which from time to time encompassed him, and his personal necessities, and the purposes for which his appropriations were made. Also, the fact that his friends made his employers whole, and that otherwise he had so commended himself to the favor of his employers suffering by his crime, that they at all times, as well as now, evince a disposition to forgive his abuse of their confidence, and to support him against the punishment which the law provides. We find that otherwise than for this crime, his disposition, character, and habits have so strongly commended him to his friends, acquaintances, and persons of his faith, that they are unanimous in the belief that the

exposure and humiliation of his conviction are a sufficient punishment, and that he can be saved to the good of society if nothing further is done with him."

**A Loophole in Workman's Compensation.**

A RECENT decision of the New York Court of Appeals points out one particular wherein a Workman's Compensation Act denies a remedy which was allowed prior to the act. The New York act, like many others, is exclusive of all other remedies with respect to persons within its scope. In case of the death of an employee it provides for compensation to certain beneficiaries, viz., a surviving spouse, a dependent parent or grandparent, and children and certain other relatives if dependent and if under the age of eighteen. Under that act it was held that adult brothers and sisters of an employee within the terms of the act were without remedy in case of his death by reason of the negligent act of his employer. The court said in conclusion:

"The Constitution permits the legislature to provide a remedy exclusive of all other rights or remedies for death of employees resulting from injuries; the legislature has provided the exclusive remedy. If the classes of persons benefited are unnecessarily restricted in death cases the remedy is not by a strained interpretation of the Constitution by the courts but by a mere amendment to the Compensation Law by the legislature."

A very similar ruling was made in *Gregutis* v. *Maclark Wire Works,* 86 N. J. Law 610, wherein an alien dependent of a deceased workman was held to be without remedy. Legislative action will probably supply a remedy in the class of cases referred to. Yet it is not altogether clear that the spirit of the Workmen's Compensation Acts does not require a limitation of the liability to actual dependents. As was said by the New York court in the case heretofore discussed:

"Under this legislation both classes, employer and employee, gained benefits and made concessions. The liability of the employer is no longer bounded and limited by the rules of negligence but is imposed upon him when he is without fault as well as when he is guilty of negligence. The employee and his dependents receive compensation which may be smaller than would have been the amount of a judgment in a negligence action, but on the other hand they are compensated for injuries resulting from risks heretofore assumed by them, the relief is summary, the practice simple, and they are not hampered or defeated by rules of negligence law or by technical defenses and procedure."

**Treating the Symptoms.**

AN Ohio judge discussing the divorce evil is reported to have said: "If there were more children there would be fewer divorce suits." No doubt about it. And if all the doors of self-support were still closed to woman there would be fewer divorce suits. Where there are children, men and women will bear abuse and suffering for their sake that they would not endure if they had only themselves to consider. But just how does that help the matter? The so-called "divorce evil" is not in the divorce but in the conditions that lead up to it. To bind and gag a sufferer may avoid annoyance to his happier neighbors but it does little to end the suffering. If a man is brutal and drunken will the advent of twins work a revolution in his character? If a woman is slovenly and nagging, will she be cured by a multiplication of her duties and cares? Divorce like crime has its roots in our economic and educational system. Until these are eradicated, no specific will remove the symptom.

**Farmer Judges.**

IT is reported that a bill has been introduced in the North Dakota legislature providing that at least three of the five judges of the Supreme Court of that state shall be bona fide farmers. In view of the power of the agrarian element in that jurisdiction it is by no means impossible that the bill will become a law. No particular fear need be entertained that the administration of the law will suffer greatly if it does. In any Western state there are plenty of good lawyers who are also farmers, and no doubt at least three worthy successors to the fame of Seneca are now shoveling through the ten-foot snow drifts in front of their Dakota barns. The atrocity of the act lies in its emphasis on occupational classes, each seeking its own aggrandizement indifferent to the general welfare. It is of a piece with the exemption of labor trusts and agricultural trusts from the anti-trust act. A somewhat aggravated result of this spirit was disclosed in *International Harvester Co.* v. *Kentucky,* 234 U. S. 216. It appeared that in Kentucky all combinations to raise prices were forbidden. "But," says Mr. Justice Holmes, speaking for the court, "Kentucky grows tobacco and the farmers were dissatisfied with the prices they were able to get." So farm products were exempted from the statute. "The result seems to be," continued the court, "that combinations of tobacco growers are held to do no more than restore an equilibrium, . . . whereas if prices rise after a combination of manufacturers it very nearly is presumed that the advance is above real value and that there is a crime."

If we are to have a sound administration of law men must be elected to office on their merits and not on their occupations; must be punished or rewarded for their acts according to their effect on the public interest and not according to the vocation of the actor.

**Women Prosecutors.**

A CONDITION familiar to almost every lawyer was adverted to in *Wilson* v. *State,* 5 Okla. Crim. 649, wherein the court affirmed a conviction notwithstanding the fact that the female confederate of the accused, whose guilt was shown by the same evidence, had been acquitted. Doyle, J., said: "We cannot tell what considerations enter into a verdict returned by a jury where a woman is on trial. All natural impulses tend to favor her." The inconsistent sex, between their denunciations of tyrant man for not giving woman a fair chance before the courts, have several times recognized this situation and have suggested that a female prosecutor could offset the jury sympathy for the accused. At least the theory is to be given a test, a woman lawyer having been appointed in Lucas County, Ohio, as special prosecutor in the case of a woman accused of killing a man, and who claims that the deceased assaulted her. The working out of the theory will be awaited with interest. Just as a theory, it does not seem very well founded. That the sympathy of every man should go out to a woman on trial for her life is natural—it is hard to resist saying commendable. Whether the same sympathy for her sex can be evoked by a woman

standing before the jury clamoring for the blood of the accused remains to be seen.

**Law School Education.**

WE referred in a recent issue to the fact that the Bar Association of Nebraska had recommended a bill requiring a law school diploma as prerequisite to admission to the bar. It is now reported that the bill has been defeated in the legislature, falling a victim to the time-honored argument that such a rule would have excluded Abraham Lincoln. Indiana still admits to the bar without examination every candidate who can show a "good moral character," but even that widely opened door has not up to date produced a Hoosier Lincoln. While the question is a debatable one, the weight of reason seems to be in favor of the requirement of a law school education. A man may certainly learn in an office all that is necessary to practice law successfully—what the Supreme Court has held and what the Code provides. But it is only a rare student under a rare preceptor who will learn in an office much that is impressed on the average law school student. It is in modern times the exception rather than the rule when an office student is adequately instructed in the history and theory of the law. The lawyer who rises to meet the great opportunities of the future must be a man grounded in the scholarship of the law. The more progressive law schools are adding a year to their course to make it possible the better to impart that instruction. Comparative jurisprudence, criminology, and other broadening fields of legal science now open before the student who would worthily represent his profession. Such is the new ideal of legal education, of which Dean Wigmore says: "If it is the mark of a new era in our legal education, it is also in entire harmony with the inevitable requirements of the times and with the general trend of professional education in this country and elsewhere."

As a necessary supplement to that ideal, the short cuts to the bar should be closed to those who are actuated only by a desire to "get to making money."

**'Discovered" Law.**

AFTER the filibuster in the United States Senate had resulted in the defeat of the bill to carry out the proposal of the President to arm merchant vessels against submarine attacks, the newspapers announced that some statutory law had been discovered which might not permit the President to take such action without Congressional authority. This law, it was said, was passed by Congress in 1819 and had been overlooked by statesmen and counsellors who have been pondering the subject since the memorable severance of diplomatic relations with Germany on Feb. 3rd. One might imagine that an ancient parchment had been accidentally found in a subcellar of the Capitol and rescued as it was about to be used as furnace fuel. The facts are that the Act of 1819 was carried into the Revised Statutes as section 4295, and has appeared under the title Piracy in all compilations of federal statutes, official and unofficial. (See Fed. Stat. Annot. vol. 5, p. 753.) It is found in thousands of large and small libraries and the curious had only to turn to the index head "Piracy" to find the act the "discovery" of which has apparently created amazement in certain quarters at Washington.

**APPELLATE REVIEW BY UNITED STATES SUPREME COURT LIMITED TO THREE MONTHS**

THE Act of September 6, 1916, ch. 448, 39 Stat. L. 726, entitled "An Act to amend the Judicial Code; to fix the time when the annual terms of the Supreme Court shall commence; and further to define the jurisdiction of that court," provides in sec. 6 thereof as follows:

"That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of: *Provided,* That writs of certiorari addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months."

The operation of this section as limiting three months for writs of certiorari was explained in an article on "Use of Certiorari by United States Supreme Court" in LAW NOTES for December, 1916, p. 168. Reduction to three months of the period for bringing any case to the Supreme Court on writ of error or appeal effects an implied repeal pro tanto as follows:

Of the period of one year limited for review by the Supreme Court of decisions of Circuit Courts of Appeals in sec. 6 of the Circuit Court of Appeals Act of 1891, which provision was not incorporated in the Judicial Code, sec. 241, nor elsewhere in that Code.

Of the two years limitation in Rev. Stat. sec. 1008, quoted further on in this article, for review by the Supreme Court of decisions of district courts on direct appeal or writ of error, which was not incorporated in sec. 5 of the Circuit Court of Appeals Act of 1891, nor elsewhere in that Act, and was not brought into Judicial Code, sec. 238, nor elsewhere in that Code; said sec. 238, as amended, including the United States District Court for Hawaii and for Porto Rico.

Of the two years limitation (by reference to sec. 1008) in Rev. Stat. sec. 1003, for review by the Supreme Court on writ of error to a state court, which was not incorporated in Judicial Code, sec. 237, nor elsewhere in that Code.

Of the one year period (by reference) in Judicial Code, sec. 250, for review of decisions of the Court of Appeals of the District of Columbia.

Of the two years limitation (by reference) in Judicial Code, sec. 246 (as amended), for review of decisions of the Supreme Court of Hawaii and of the Supreme Court of Porto Rico.

Of the two years limitation (by reference) in Judicial Code, sec. 247, for review of decisions of the District Court for Alaska.

Of the provision in Judicial Code, sec. 266, for review by direct appeal (no time specified) to the Supreme Court from an order of the District Court granting or denying an interlocutory injunction in certain cases.

There is nothing in any other of the seven sections of the Act of 1916 which, on the principle of *noscitur a sociis,* would afford the slightest justification for excepting from the operation of section 6 any of the several provisions above cited; in fact, Congress omitted references to and express repeal of particular provisions containing time limits, doubtless for the reason that if one of them should be inadvertently overlooked an inference would arise that it remained in force because not included in the enumeration of express repeals. In a case involving the effect of a provision limiting the right of review by the Supreme Court in cases arising under the Bankruptcy Act, the court

said: "We see no reason to doubt that the plain language of the enactment aptly expresses the legislative intent." *Central Trust Co.* v. *Lueders* (1915) 239 U. S. 11, 36 S. Ct. 1, 60 U. S. (L.ed.) 119, quoted in article on "Appellate Jurisdiction of United States Supreme Court in Bankruptcy Cases," in Law Notes for September, 1916, p. 105, and in 1 Federal Statutes Annotated, second edition, title *Bankruptcy*, p. 834.

United States Revised Statutes, sec. 1008, provides as follows:

"No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order: *Provided,* That where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability."

In the opinion of the writer of this article, the unqualified limitation of three months in the Act of 1916, above quoted, *effects an implied repeal of the proviso in the foregoing R. S. sec.* 1008. Manifestly, the Act of 1916 is categorically sufficient to do so; for if the proviso were to remain in force appeals or writs of error saved by it would to that extent contradict the negation in the Act of 1916.

"The settled rule is that repeals by implication are not favored, and will not be held to exist if there is any other reasonable construction. To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled; *or the later statute must contain negative words,"* etc. Article on *Statutes and Statutory Construction,* 1 Federal Statutes Annotated, (1st ed.) p. cx; second edition, sec. 137, p. 158. On the other hand, in many cases of great persuasiveness, courts have refused to adopt a construction which imputes to Congress an intention to provide a rule for one class of cases and a different rule for another class within the same reason as the first. Article on *Statutes and Statutory Construction,* 1 Fed. Stat. Annot. (1st ed.) p. lviii; second edition, sec. 76, p. 103. Thus Chief Justice Marshall found insuperable difficulty in attributing to Congress an intention to confer on the Supreme Court appellate jurisdiction over judgments rendered by a district court sitting as a district court, and over judgments rendered by a circuit court, as it had clearly done, and at the same time to deny such jurisdiction over judgments rendered by a district court exercising circuit court powers, it being demonstrated that Congress made no distinction in the judgments from their nature and character. *Durousseau* v. *U. S.,* 6 Cranch (U. S.) 307, 3 U. S. (L. ed.) 232.

Now, a distinction without a difference—a senseless discrimination—is just what the proviso in sec. 1008 produces if it is to remain in force; for no proviso was attached to the time limit of six months for appeals to the Circuit Court of Appeals, above cited in this article, nor to the time limit of one year for appeals from the Circuit Court of Appeals, also above cited, and no reason can be given for greater liberality in respect of appellate review of decisions of state courts and of decisions of federal district courts on direct appeal to the Supreme Court which are governed by R. S. sec. 1008.

Again, since the two years period in the enacting clause of R. S. sec. 1008 is also adopted in the proviso, is it not unreasonable to suppose that Congress intended in the Act of 1916, above quoted, to leave said two years period in the proviso in force, while reducing to three months the period of two years in the enacting clause? If it be urged that the court may by construction reduce the period in the proviso to three months, the answer is that this would be judicial legislation run wild, for the court has no right to assume that Congress would be willing to have the same period in the proviso as in the enacting clause; in Rev. Stat. sec. 1069, quoted below in this article, Congress made the period in the proviso only half as long as in the enacting clause.

Still again, the Act of 1916 above quoted fixes the time limit for certiorari also at three months. It cannot for a moment be contended that the proviso in sec. 1008 may be reduced and read into *that* time limit. If the proviso in sec. 1008 remains in force the consequence is that a writ of certiorari is limited to three months, but cases within the proviso have the benefit of two years. Would not that be an absurd inconsistency?

In 1 Blackstone's Com. 89, after the statement that "an old statute gives place to a new one," the author says (italics at the end are his): "But this is to be understood, only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks; here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end. But, if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offense be indictable at the quarter-sessions, and a latter law makes the same offense indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offense shall be indictable at the assizes, *and not elsewhere."* The distinction made by Blackstone between an enabling statute and a restraining one, was recognized and applied in The Protector (1870) 9 Wall. 687, 19 U. S. (L. ed.) 813, which was a case where the time limit for appeal was not "couched in negative terms."

Nevertheless, the question now under discussion is not easily answered, in view of the following cases. Thus, Rev. Stat. sec. 1069 provided that "every claim against the United States cognizable by the Court of Claims shall be forever barred" unless the petition shall be filed "within six years after the claim first accrues," concluding as follows:

*"Provided,* That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other

disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

The Tucker Act of 1887, sec. 1, provided as follows:

"The Court of Claims shall have jurisdiction to hear and determine the following matters: . . . *Provided,* That no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

It was held that this proviso in the Tucker Act did not repeal the above quoted proviso in Rev. Stat. sec. 1069. *United States* v. *Greathouse,* (1897) 166 U. S. 601, 17 S. Ct. 701, 41 U. S. (L. ed.) 1134, where Mr. Justice Harlan, speaking for the unanimous court, said:

"The act of 1887 only superseded such previous legislation as was inconsistent with its provisions. It is true that if that act be literally construed, there is some ground for holding that Congress intended by the proviso of § 1 to cover the whole subject of the limitation of suits against the government, in whatever court instituted. But we cannot suppose that it was intended to strike down the exceptions made in U. S. Rev. Stat. § 1069, in favor of 'the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued.' Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost* v. *Wenie,* 157 U. S. 46, 58, 39 U. S. (L. ed.) 614, 619; *United States* v. *Healy,* 160 U. S. 136, 147, 40 U. S. (L. ed.) 369, 373. In conformity with this principle we must adjudge that the above proviso of U. S. Rev. Stat. § 1069, is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently that the claim of a person who was beyond the seas at the time the claim accrued is not barred until three years shall have expired after such disability is removed without suit against the government."

It may here be mentioned, as bearing upon a point further to be noticed in this article, that Mr. Justice Harlan also said: "We may add that it was not contemplated that the limitation [in the Tucker Act] upon suits against the government in the district and circuit courts of the United States should be different from that applicable to like suits in the Court of Claims."

So it seems that the situation presented in *United States* v. *Greathouse* was not complicated with anything that militated against application of the ordinary rule against implied repeals.

*Reid* v. *United States,* (1909) 211 U. S. 529, 29 S. Ct. 171, 53 U. S. (L. ed.) 313, is another case demanding consideration. The Circuit Court of Appeals Act of 1891, sec. 14, provided that "All acts or parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed." By construction of the provisions of the Tucker Act of 1887, an appeal could not be taken from the district court direct to the Supreme Court by a claimant where his demand was less than $3000. It was held that this limitation remained in force despite the fact that the Circuit Court of Appeals Act of 1891 imposed no jurisdictional amount in its general provisions for appeals from the district court. "We are of opinion," said the court, "that, in any event, the repealing words that we have quoted do not apply to the special jurisdiction of the district court sitting as a Court of Claims." After showing that the $3000 limitation would have applied to an appeal by a claimant from a decision of the Court of Claims, the court continued: "It would not be expected that a different rule would be laid down for other courts that, for convenience, are allowed to take its place, when originally the rule was the same. *It does not seem to us that Congress has done so unlikely a thing.* The Act of March 3, 1891 [Circuit Court of Appeals Act] is dealing with general, not special, jurisdiction. It has been decided in some cases of special jurisdiction that there is an implied exception to almost equally broad words in the same act. . . . A change looking to the ordinary business of the courts should not be held to embrace that, merely on the strength of words general enough to include it, when the policy of the repealing law, and the policy of the law alleged to be repealed, have such different directions, and when it appears that the general policy of the latter is still maintained. The limitation with reference to amount unquestionably remains in force for the district court in cases outside of the Act of 1891, sec. 5, as well as for the Court of Claims. In our opinion the Act of 1891, sec. 5, was not intended to create exceptions, when no such exceptions exist for the Court of Claims."

The decision in *Reid* v. *United States* was therefore based upon the principle that special provisions in one statute may coexist with antagonistic general provisions in another statute where the special provisions are not specifically repealed. This is a familiar principle, and has been applied in a multitude of cases cited in the article *Statutes and Statutory Construction,* Fed. Stat. Annot. first edition, p. cxiv; second edition, sec. 142, p. 164. If it be argued that this principle saves the proviso in R. S. sec. 1008 from implied repeal by the Act of 1916, inasmuch as the proviso must be regarded as special and the Act of 1916 as merely general, a sufficient reply is that the argument proves altogether too much, for the same argument would preserve the enacting clause of sec. 1008 equally with the proviso, and, as above shown, the two years limitation in the enacting clause has undoubtedly gone by the board. Secondly, in *Reid* v. *United States,* the principle that Congress is unlikely to make distinctions without a difference was not only expressly recognized, but influenced the decision of the court; and, as above shown, this is the very principle which the writer of this article has invoked in support of his contention that the Act of 1916 repeals the proviso in Rev. Stat. sec. 1008. Thirdly, the opinion in *Reid* v. *United States* points out that a "policy of the law" was subserved by preserving the special provision limiting the jurisdictional amount for appeal, and, as shown below, the policy of the later legislation of Congress is averse to preservation of provisions extending the time for appeal.

If the foregoing be not regarded as sufficient to establish the writer's thesis that the proviso in Rev. Stat. sec. 1008 is impliedly repealed, the following considerations are offered. Beginning with the Judiciary Act of 1887-1888, and not ceasing with the enactment of the Circuit Court of Appeals Act of 1891, it has been the constant policy of Congress, as manifested in various acts, to relieve the burden of the Supreme Court, both by contracting federal

jurisdiction at its source and by limiting appellate jurisdiction; especially in the last two years by substituting certiorari for review by appeal or writ of error. Prior to the enactment of the Revised Statutes and for some time afterward, justices of the Supreme Court had time to go on circuit and to edit volumes of reports of their opinions in cases on circuit. In those days provisos excepting periods of disability in statutes limiting the time for appeal or error were the rule rather than the exception. But the Circuit Court of Appeals Act of 1891 retained none of them, or if, perchance, Rev. Stat. sec. 635 remained in force, it was expressly repealed by Judicial Code, sec. 297. The Act of September 6, 1916, sec. 2, withdraws part of the jurisdiction theretofore exercised by the Supreme Court on writ of error to a state court and substitutes certiorari therefor. Sec. 5 of the same Act withdraws all appellate jurisdiction over the Supreme Court of the Philippine Islands, except on writ of certiorari. Can it be reasonably supposed that Congress would at this day scruple to wipe the two years proviso in Rev. Stat. sec. 1008 off the statute book?

Charles C. Moore.

## THE BINDING FORCE OF INTERNATIONAL LAW *

The difficulty of deciding whether International Law is really law is surprising to anyone not acquainted with the fundamental difficulty which lawyers have in defining the term "law" itself. The definition of law has puzzled lawyers throughout the ages, and has resulted in the formation of various schools of legal thought, with great diversity of opinions. In considering whether International Law is law or not, it is, of course, essential to decide, first of all, what law is, as different legal writers have differed in their definition of law, so some (*e.g.*, Austin) have asserted that International Law is not law, and others (*e.g.*, Westlake and Hall) that it is. To set out the definitions of these various jurists, and to comment on them, would occupy far too much space, and would, perhaps, lead to no definite result. It may serve our purpose better to confront the problem in our own manner, using the opinions of the different jurists as materials on which to rely.

### I.

When a man wants justice done to him and to his rights, he goes—perhaps as a last resort—to the Courts of Law. He believes that there, at any rate, he will get justice, for the law is justice administered in the Courts of Law. But not only does he get his due rights defined for him. That would not help him very much if he could not get these rights enforced. He does get these rights enforced. And thus we come to one of the essential characteristics of law, viz.: the law is something that can be enforced, that must be obeyed, and that can be disobeyed only at the risk of punishment of some sort or other; for law is based on force. This may be expressed in another way. As Mr. Salmond has shown, the sources of law are both material and formal. The multifold rules of law are derived (for instance) from custom and legislation. These are material sources of law. The formal source of law "is that from which it obtains the nature and force of law," *i.e.*, "the power and will of the State." Although it has been argued by some writers that force is not an essential quality of law, if we examine the law of civilized nations, we find that each system of law is characterized by the fact that it is enforced, and that it cannot be disobeyed with impunity. Even early forms of law show this. Wherever men live together, they must (and unconsciously do) follow certain rules in their intercourse with each other, *e.g.*, rules regarding personal safety, rights to property, and so on. Otherwise there would be anarchy and chaos. Let us go farther and postulate that such rules exist, but that there is no means of enforcing them. Would there still be a quiet, orderly—what we should call law-abiding—community, or would there still be anarchy? We should certainly say that there would still be an absence of law and order, for where men can break rules of conduct with impunity, such rules will be broken. Even nowadays, where breaches of such rules are forcibly discouraged, there are people who break them. So that to have what we call law, a community must have not only rules which the people composing the community regard as binding, but also which the community will enforce on any individual, and a breach of which the community will punish in some way or other. Even early law, and what we would call uncivilized law, has this quality, although "the instrument of enforcement is not necessarily physical force, but may consist in any other form of constraint or compulsion by which the actions of men may be determined." For instance, the punishment may not always be secular. The breach of some rules of the early Roman Law brought sacerdotal—and not secular—punishment on the wrongdoer. But the point of importance is that there was a punishment with which to enforce these rules, which, therefore, formed a system of law. Of course, there have been very early communities which had rules for the governance of the people composing them, and yet no adequate means of enforcing the rules, but these rules were not law in the real sense. They may be primitive substitutes for law, but they are not law. As one prominent writer on Jurisprudence says: "There may have been a time in the far past, when a man was not distinguishable from an anthropoid ape, but that is no reason for now defining a man in such wise as to include an ape." An extreme example may be taken to emphasize our view—an example of law, of rules which are enforced, though those who obey them are not congregated in one territorial portion of the earth's surface, but are citizens of all civilized States, viz., the law of the Roman Catholic Church—the Canon Law. Not only do the members of that Church consider themselves bound by the rules of the Canon Law, but also these rules are enforced by the punishments of the Canon Law, such as excommunication, refusal of sacraments, and so on.

We may, then, define law as the rules of human conduct which are regarded by a community as binding on its members, and which are enforced by the community on its members. These rules may change with succeeding generations, as men's opinions of what is right and wrong change, but the enforcement of the rules always exists, and is the factor that makes them what we call law. It should further be noted that the enforcement of these rules of conduct does not depend on the caprice of the individual; on the willingness or unwillingness of the wrongdoer to suffer his punishment. On the contrary, the rules are enforced by some power external to the individual, by the community, on the individual even against his will and without directly consulting the wishes of other members. Individual members of the community cannot prevent the action of the law (except perhaps by revolution), though they can cause the law to be changed. If we substitute the term "State" for "community"—and in modern times the earth's surface is divided into States—the same holds good. The State through its Government enforces the law

* P. M. Clouts, in *South African Law Journal.*

on its citizens, though these citizens can, by means of Parliament, for example, change a rule of law which they have come to think unjust and pernicious, and can even have entirely new law created. The power of the State over its citizens is so great that the vast majority obey the law without having to be forced to do so, and without the State having to exercise its power. To make this investigation more complete, and to bring out even more clearly that enforcement is an important factor of the law, it may be as well shortly to consider and contrast with law those rules which are commonly termed "Etiquette." Rules of Etiquette have this much in common with the rules of Law—they are rules regarded by members of a class or community as binding on themselves. But they differ most markedly in that rules of Law are enforced by the community or State, whereas it is left to individuals themselves—to public opinion—to enforce the rules of Etiquette; and this is the essential difference between them.

The material contents (*i.e.*, the rules) of law have their own characteristics apart from those just discussed. But we can leave them out of consideration, as their discussion would not affect the question we are dealing with. For our present purpose we must note (as indicated above), that the following are essentials of the existence of law: (1) There must be a community composed of individuals bound together by some common interest and having intercourse with one another; (2) Law is formed of rules of conduct which a community considers as binding on its members, and which it enforces on them. From these two essentials it follows also that—(3) There must be an authority to enforce these rules—either the State or, in early times, the community itself; (4) Individuals must have recourse to the proper authority for the redress of their wrongs, and cannot take the law into their own hands. In modern times the State provides Courts of Law for this purpose, but when men lived in small communities, the community itself may have been the judge, or may have permitted the disputants to place their dispute before some member of the community, perhaps one of the elders; in which we have a similar proceeding to-day in arbitration. But a small note of explanation (rather than of modification) must here be added. Even nowadays in one or two cases a man is allowed to take measures to protect his rights without appealing directly to the law. For instance, the right of "lien" in English Law, by which if a man has in his possession property belonging to another who owes him money, he can, under certain circumstances, retain that property until the money is paid, though he cannot sell the property in order to realize the amount of his demand. But such rights are much circumscribed, can only be exercised cautiously, and are only permissible because the law allows their exercise under proper conditions. Doubtless such cases are relics of a lawless time when men were governed by rules to which there was no adequate means of obtaining obedience, and when self-help was the order of the day. But such rules cannot be called law, as we understand the term "law" in modern times. Moreover, as authority in communities grew stronger, and communities were able to enforce their rules, self-help became enveloped with the strictest of rules, and we find that (*e.g.*, in the early Roman Law) the slightest departure from the rules laid down in this connection vitiated the whole proceeding, so that people became less inclined to take measures themselves, but appealed for justice to the appointed authority.

## II.

The definition and certain characteristics of law having been discussed and indicated, we can now turn to our main object, and see whether International Law is really law. The obvious method, and the one that comes first to hand, is to inquire into the nature of International Law and see whether it has any of the qualities mentioned above. Firstly, then, is there a community of States? The answer is in the affirmative. Just as men cannot live entirely alone and cut off from the rest of mankind, so also with States. A modern civilized State has many interests in common with other States, *e.g.*, industry, agriculture, commerce, science, art, and probably religion. That is why a State keeps ambassadors and consuls in other States. No State itself produces all it wants, and it has, therefore, to get the products of other States. An elaborate international machinery has been built up, and there are international offices or commissions in regard to "the Post Office, Telegraphs, Cables, Commerce, Agriculture, the protection of Works of Art and Literature, the welfare of the working-classes (*i.e.*, the prohibition of night work for women in industrial employment, and the prohibition of the use of white phosphorus in the manufacture of matches), weights and measures, and many others." In fact, there is no doubt that civilized States have many strong interests in common, have much dealing with each other, and do form a community. Now, just as men in their constant dealings with one another cannot live without some rules for their governance springing up, so States, in their intercourse with one another, must have similar rules. And such rules have come into being. So that International Law is certainly a body of rules for the guidance of States in their dealings with each other. Some of these rules have grown up through custom, others have been created by international agreement such as the Declaration of Paris, 1856, and the rules regarding land warfare, etc., agreed on at the Hague Conference of 1899 and 1907. But what these different rules are does not concern us here, just as we do not discuss the composition of the rules of law. For, if they do not possess all those attributes which are stated above to be essential to Law, they are not law, whatever else they may be. Secondly, do the States which form the community of States—or, as it is called, the Society of Nations—regard these rules as binding on themselves? In the light of the world-wide struggle taking place at the present moment, it is at first sight somewhat difficult to say whether this is so or not. Before this war one would have been justified in saying that the States did consider these rules binding on themselves. And even now, after the events of the past eighteen months, it would seem that they still consider these rules binding. In every war there are mutual recriminations. Each belligerent accuses the other of having broken the rules. And this war is no exception. The Allies with great cause accuse the Germans of such conduct; the Germans accuse the Allies. But the very fact that such accusations and excuses are made would point to the fact that the States consider the rules of International Law binding on themselves. Thus ever since they began to use their submarines in such ruthless fashion, the Germans have attempted to show that they were keeping within the rules of International Law, and have denied that they were breaking these rules. They have not, however, asserted that they were entitled to break these rules. What they do is this: they interpret the rules according to their own interests for the time being. Their attitude would seem to be, that these rules are certainly binding on States, but, of course, a State that is powerful enough can break them. But taking all the circumstances into consideration, and in view of the conduct of the Allies, it would seem—and the point is here conceded—that States do consider themselves bound by the rules of International Law.

So far it has become evident that International Law is a body of rules of conduct which a community (of States) regards as

binding. But, as will be remembered, this stops short of our definition of Law, and there still remains to be considered, among other things, the most important point, whether the community of States enforces these rules. It can be plainly and simply stated, without any qualification, that the community of States does not enforce these rules on its members. It has no means of doing so. Each State is independent, and is not subordinated to any other authority but its own, *e.g.*, Great Britain, France, Russia and Germany are each sovereign States, and do not owe obedience in any shape or form to any superior authority. If one State breaks any rule of International Law there is no machinery by which the community of States as a community can punish the wrongdoer and force it to make amends to any injured State. The injured State must take its own part. Self-help is the order of the day, and this may lead—and usually does lead—to war, in which case the more powerful State will win, no matter how much in the wrong it may have been originally. And, unfortunately, Might is not always on the side of Right. Each State is its own judge in its own cause—unless it consents to submit the dispute to arbitration. Other States by intervening may, of course, compel the delinquent to return to the right path. But this is action by individual States, and not by the community as a whole, and usually only happens where the wrongdoing State is comparatively small, and even then may lead to the slaughter and misery of war. The great war now in progress is an example in point. A small State (Servia) was said to have injured a large one (Austria-Hungary). Arbitration was refused by the powerful State, which thought it could easily crush the small one. The result is a war in which the most civilized nations are taking part, and at which the rest of the world looks aghast. Let us ask ourselves the question: If International Law were really law could this have happened? If a small man injures a big man can the latter turn round and smash the small one to bits? Or can he gather all his friends and attack the small man and his friends? No. He must attempt to get his remedy (or revenge, to put it that way) in the proper manner, which is by having the small man up before the proper authority. In other words, he must go to the law for satisfaction. If he or his friends do not do so, but take the law into their own hands, they render themselves liable to punishment. If International Law were really law Austria would have *had* to go before a tribunal to settle her differences with Servia, and would have had to abide by the decision of that tribunal. As has already been pointed out, there is no authority which can enforce the rules of International Law. Although the States form a community, this community is as yet not so strongly bound together as to have some central authority which shall see that its rules are carried out. It is left to the States themselves to amend any injury or wrong done to them.

Again, citizens of a State are compelled to lay their differences before a proper tribunal. They cannot take the law into their own hands—they cannot go to war with one another—except at the risk of being punished, or even stopped while in the act. Civilized States provide Courts of Law, which exist for the purposes of settling differences between persons living within their boundaries. But a State is not compelled to lay her disputes with other States before a tribunal—there is no "must" in its case; it can do so if it likes. But if it does not want to go to arbitration there is no rule which says that it must be compelled to that course, nor is there an authority which could compel it to do so. There is a Permanent Court of Arbitration at The Hague in Holland, for the settlement of international disputes. This court was established by the first Hague Peace Conference in 1899, but submission to it is voluntary and not compulsory. And, of course, the more a State is in the wrong, the more determined it may be to avoid arbitration, especially if it is a powerful State. So that in the last resort the remedy of an injured State will lie in, firstly, reprisals (which means that in order to get satisfaction for a breach of law the injured State must also break the law!) or, secondly, war (which means that if the injured State has no chance of beating its opponent, it is remediless).

Thus, when summed up, the result of the foregoing investigation comes to this: (1) There is a community of States with common interests, though more loosely bound together than the modern communities known as States; (2) International Law is a body of rules which are (most probably) regarded by the community of States as binding; (3) But these rules are not enforced by the community; (4) Nor is there an authority to enforce them; (5) The enforcement is left to the individual States themselves. They each have to take their remedy, in the last recourse, by force. We are, therefore, bound to come to the conclusion that International Law is not law, for it does not fulfil the definition of law given above, but is deficient in at least one most important attribute, viz., that its rules are not enforced by the community of States for whose guidance it exists. It has this much in common with law—that it is composed of rules of conduct which are regarded by a community (of States) as binding on its members. But here it stops short; and therein lies its great difference from law—it is not enforced by the community.

(*To be continued.*)

## Cases of Interest

Professional Services Rendered by One Attorney for Another as Presumptively Gratuitous.—The question suggested in the catchline is answered in Thigpen *v.* Slattery, (La.) 73 So. 780, as follows: There is no doubt a rule of courtesy among the members of the bar, as among members of other professions, agreeably to which each will render services to the others without expectation of reward, other than such as may come by way of similar service; but the courtesy of the profession is not to be strained to meet the demand of one who, having practically withdrawn from the profession and thereby disabled himself from reciprocating in kind, demands the courtesy as an aid to the accumulation of wealth in another pursuit. A member of the bar, who is no longer engaged in the active practice of his profession and has accumulated wealth in other pursuits, has no right to avail himself of the services of an active practitioner, in a long litigation, involving valuable property, upon the assumption that the services will be rendered gratuitously, by reason of a custom, supposed to prevail at the bar of that city, since no such custom, applicable to the case stated, is shown to prevail.

Liability of Saloonkeeper for Injuries to Child on Street Due to Ejection of Drunken Man from Saloon.—In Feeney *v.* Mehlinger, (Minn.) 161 N. W. 220, the evidence was held sufficient to sustain a finding of the jury that the defendant ejected a drunken man from his saloon with such force that he was thrown or fell upon a child standing on the street watching a parade and that in ejecting him he was negligent in respect of such child. The court said: "The culpability of the defendant is to be judged in view of the duty owing by

him to persons rightly on the street and not merely in view of his rights as respects the drunken man. If he was negligent in respect of the child he is not relieved of liability because his conduct was rightful in respect of the drunken man. We find no case precisely in point. In Thayer *v.* Old Colony R. Co., 214 Mass. 234, 101 N. E. 368, 44 L. R. A. (N. S.) 1125, Ann. Cas. 1914B 865, it was held that a carrier lawfully ejecting a drunken man from a car was liable for negligence which accompanied its act and resulted in injury to a passenger. And see Clish *v.* Boston, etc., R. Co., 219 Mass. 341, 106 N. E. 854; Gray *v.* Boston, etc., R. Co., 168 Mass. 20, 46 N. E. 397. The principle is clear. The child was rightfully on the street. The defendant was rightfully ejecting a man from his place. In doing so he made use of the street. Negligence in respect of the child accompanied his act and for it he is liable."

VALIDITY OF STATUTE LIMITING HOURS OF LABOR FOR FEMALES IN RESTAURANTS BUT EXCEPTING RAILROAD RESTAURANTS.—As is well known there is no constitutional objection to statutes limiting the hours of labor for females if their provisions are reasonable, but it was held in State *v.* Le Barron, (Wyo.) 162 Pac. 265, that limiting the hours of labor of females in restaurants was invalid where it made an exception in the case of females in railroad restaurants. The court by Beard, J., said: "In the case before us, by the first section of the act, restaurants are designated as a class, for the female employees in which the legislature deemed protection necessary, by limiting the hours of employment. It, then, by the second section of the act, selects certain restaurants, included in the general or natural classification, and exempts them from the operation of the act, not on account of any substantial difference or distinction in the kind or character of the labor required of those employed, or because it is more healthful to work in a restaurant operated by a railroad company than in one conducted by others; but because, as contended by the Attorney General, railroad restaurants 'are operated for the benefit and convenience of the passenger traffic traveling to and fro over the different railroads, and for the benefit and convenience of the employees thereof,' and for that reason, it is argued, they differ materially from other restaurants. But that leaves out of consideration the purpose of the enactment. It is not a statute to promote the convenience of the traveling public or the employees of railroads, but to protect the health of females employed in restaurants; and we apprehend that the health of a female may be as seriously injured or impaired by working overtime for the benefit and convenience of the traveling public, or railroad employees, in a restaurant operated by a railroad company as in any other."

PERMITTING USE OF STREET FOR RACING AND TESTING AUTOMOBILES AS "DEFECT IN STREET."—A statute allowing damages against a municipality for injuries resulting through a defect in any street was construed in Burnett *v.* Greenville, (S. C.) 91 S. E. 263, to cover injuries received by a person run into by a racing automobile; the allegation of the complaint, which was admitted, being that the plaintiff was struck with great force by an automobile running on the main street of Greenville at a terrific rate of speed, probably seventy-five to one hundred miles an hour, which was using the street as a place of practice for hill climbing with the knowledge and consent of the city, its mayor, councilmen, and policemen. The words "defect in any street" were held to include the keeping of a street in such physical condition that it would be reasonably safe for street purposes. The court said: "It is suggested by the city that the dedication of the public ways to automobile racing lay wholly outside of the powers of the corporation, for which act the corporation is not liable. That is another way of saying the corporation is liable if the authorities act within the law, and is not liable if the authorities act without the law. The prime duty of any city is to keep its streets clear for the public travel. The incumbrance of the streets with automobiles running at a dangerous rate of speed, just for practice, is a violation of that prime duty. To answer that the mayor and council had no authority to authorize such a use of the streets, is to admit the wrong. It is true there are decisions from other jurisdictions which sustain this view of the respondent, but they do not commend themselves to our judgment, and they do not express the general rule of law. . . . We are of the opinion that the street thus dedicated by the authorities to a hazardous use was not then reasonably safe for prime street purposes."

VALIDITY OF STATUTE REQUIRING COMMON CARRIERS TO FURNISH ADEQUATE TELEPHONE CONNECTIONS BETWEEN BUILDINGS, ETC., AND LOCAL TELEPHONE EXCHANGE.—A statute requiring common carriers to furnish adequate telephone connections between the offices, buildings and grounds of a common carrier and the local telephone exchange is a proper and reasonable regulation in the opinion of the Minnesota Supreme Court, which in State *v.* Missouri Pac. R. Co., 161 N. W. 270, has this to say of it: "The furnishing of adequate facilities for the transaction of public business is a function of a common carrier. It may be required to establish stations at proper places. Minneapolis & St. L. R. Co. *v.* State of Minnesota, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614. The duty to provide adequate facilities is not performed by supplying a minimum of service. The state may, within proper limits, require a carrier to furnish facilities for the convenience and comfort of the traveling public. Missouri P. R. Co. *v.* State of Kansas, 216 U. S. 262, 280, 30 Sup. Ct. 330, 54 L. Ed. 472; Atlantic Coast Line R. Co. *v.* North Carolina Corporation Commission, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398. The telephone is in general use as a factor in the transaction of public business, and a statute requiring a railroad company to connect a station with a local telephone exchange for the convenience of shippers and passengers does not go beyond the incidental duties of a common carrier. Atchison, T. & S. F. R. Co. *v.* State, 23 Okl. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 908. The evidence in the present case tends to show that the telephone is a necessary facility for the proper performance of respondent's duties as a common carrier. While the element of expense should be considered in determining the reasonableness of the requirement, it is not necessarily controlling. Missouri P. R. Co. *v.* State of Kansas, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472; Atlantic Coast Line R. Co. *v.* North Carolina Corporation Commission, 206 U. S. 1, 26, 27 Sup. Ct. 585, 595 (51 L. Ed. 933, 11 Ann. Cas. 398). In the case last cited it was said: 'As the primal duty of a carrier is to furnish adequate facilities to the public, that duty may . . . be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result.'"

WEIGHT GIVEN TESTIMONY OF NEGRO ACCUSED OF SELLING LIQUOR.—In Moseley *v.* State, (Miss.) 73 So. 791, the question under consideration related to the weight to be given the evidence of a negro accused of selling liquor. It appeared that the appellant was indicted, tried, and convicted for selling a bottle of whisky. Appellant was a negro, and the sole state witness was a white man. The white witness testified that he bought a pint of whisky from the negro defendant, paying her therefor one dollar. The defendant denied the commission of the crime charged, in detail and in toto. The district attorney, in his clos-

ing argument to the jury, said: "It is just a question of whether or not you believe this negro or Matt Edwards." Appellant's counsel objected to this statement of the district attorney, whereupon the district attorney "rubbed it in," by this retort: "She is a negro; look at her skin. If she is not a negro, I don't want you to convict her." The trial court did not rule upon the objection—he merely said, "Well, what is she?" On these facts the Supreme Court reversing the conviction said: "It will be seen that the representative of the state staked his case upon the question as to whether or not the defendant was a negro. If she was a negro, and the state's witness was a white man (which latter fact seems not to have been contradicted), then the district attorney demanded that the law of the land would be vindicated only by a conviction of the defendant. So we have a case wherein the very important fact of the race of the defendant was put in question, and when the jury, by an inspection of the skin of the defendant, or that part of same visible to the jury, determined this crucial question in favor of the state, it logically followed that a verdict of guilty would be returned, and was returned. The trial judge, by ignoring the objection of appellant's counsel, seems to have approved the issue presented by the lawyer for the state. True, some casuists make bold to assert, from a moral point, that the purchaser of whisky is, at least, quite as bad as the seller. But, to keep safely within the issue presented, this point was not urged by defendant. The jury decided, first, that the witness was a white man, and the defendant was not only of African descent, but more, that she was a female, and the concurrence of these facts necessarily demand that the issues presented should be determined in favor of the prosecutor. It is our opinion that the guilt of the defendant must be proven beyond all reasonable doubt, and that the color of her skin, the race to which she belonged, and her sex had nothing to do with the case, except as an appeal to race antipathy and prejudice. This injection of race questions into court trials has been uniformly condemned by this court. Hardaway *v.* State, 99 Miss. 223, 54 So. 833, Ann. Cas. 1913D, 1166."

Validity of Ordinance Regulating Erection of Billboards. —The United States Supreme Court in Cusack Company *v.* Chicago, U. S. Adv. Ops. 1916, p. 190, held valid an ordinance of the city of Chicago which required that before any billboard or signboard of over twelve square feet in area could be erected in any block in which one-half of the buildings were used exclusively for residence purposes, the owners of a majority of the frontage of the property on both sides of the street in such block should consent in writing thereto. This, it was claimed, was not an exercise by the city of power to regulate or control the construction and maintenance of billboards, but was a delegation of legislative power to the owners of a majority of the frontage of the property in the block "to subject the use to be made of their property by the minority owners of property in such block to the whims and caprices of their neighbors." Mr. Justice McKenna dissented but wrote no opinion. The opinion of the majority was written by Mr. Justice Clarke and in it he says: "The supreme court of the state of Illinois sustained the validity of the ordinance in an opinion (267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916C 488) which declares that the act of the legislature of that state, passed in 1912 (Hurd's Stat. 1913, chap. 24, par. 696), is a clear legislative declaration that the subject of billboard advertising shall be subject to municipal control. It is settled for this court by this decision that the ordinance assailed is within the scope of the power conferred on the city of Chicago by the legislature, that it is to be treated as proceeding from the lawmaking power of the state, and that, therefore, it is a valid ordinance unless the record shows it to be clearly unreasonable and arbitrary. Reinman *v.* Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511. Upon the question of the reasonableness of the ordinance, much evidence was introduced upon the trial of the case, from which the supreme court finds that fires had been started in the accumulation of combustible material which gathered about such billboards; that offensive and insanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals. As bearing upon the limitation of the requirement of the section to blocks 'used exclusively for residence purposes,' the court finds that the trial court erroneously refused to allow testimony to be introduced tending to show that residence sections of the city did not have as full police or fire protection as other sections have, and that the streets of such sections are more frequented by unprotected women and children than, and are not so well lighted as, other sections of the city are, and that most of the crimes against women and children are offenses against their persons. Neglecting the testimony which was excluded by the trial court, there remains sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences, in a class by themselves (St. Louis Gunning Advertising Co. *v.* St. Louis, 235 Mo. 99, 137 S. W. 929), and to justify the prohibition against their erection in residence districts of a city in the interest of the safety, morality, health, and decency of the community."

Liability of Municipality Maintaining Public Baths for Negligence of Officers.—The growing disposition of municipalities to maintain public baths for their inhabitants makes the recent case of Bolster *v.* City of Lawrence (Mass.) 114 N. E. 722, one of more than passing interest. The question concerned the liability of a municipality maintaining public baths for the negligence of its officers in connection therewith. The question arose on demurrer. The allegations in the several counts of the plaintiff's declaration, so far as material, were in substance that the defendant city maintained and operated a bathhouse established by it on the shore of the Merrimac river, whereby the plaintiff's intestate, who had resorted to the bathhouse for the enjoyment of the facilities there afforded, while in the exercise of due care, was mortally injured by the giving way of the structure and its approaches, resulting from the negligence of the defendant and its servants. The bathhouse was maintained under R. L. c. 25, §§ 20, 21. Thereby the defendant was authorized to purchase or lease land and erect or repair a building "for public baths" and to "make open bathing places" and to "provide instruction in swimming" and also to "establish rates for the use of such baths." There was no averment that the defendant made any charge for the use of the bathhouse. The argument proceeded upon the assumption that no charge was made, and that the bathhouse was established and maintained for the free use of the public. It was held that the case did not state a cause of action. Rugg, C. J., for the court said: "The difficulty lies not in the statement of the governing principles of law, but in their application to particular facts. The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no liability; if it is not, there may be liability. That it may be undertaken voluntarily and not under compulsion of statute is not of consequence. Tindley *v.* Salem, 137 Mass. 171, 50 Am. Rep. 289. The maintenance of free public baths upon the bank of a river is in its essence a public benefit. It is manifestly in the interests of the public health that the people have abundant facilities for cleanliness. Oppor-

tunity for swimming under sanitary conditions and under the protection and with the instruction of public officers tends toward the amusement of the people as well as their healthful and athletic exercise. It belongs in the same class of public service as municipal playgrounds and swimming pools for small children. It is a kind of social advantage which the commonwealth long has provided at Nantasket and Revere beaches on a considerable scale. It is in its intrinsic characteristics a project for the general good of all the public. The only doubtful aspect of the case arises from the circumstance that the statute empowers the cities and towns, which vote to adopt its provisions, 'to establish rates for the use of such baths,' and thus possibly to derive a revenue or profit from the undertaking. But, as has been pointed out, there is no allegation that there has been any rate charged in the case at bar. The simple possibility that a charge might have been made is not enough to transform that which in its main feature as actually conducted is a purely public duty rendered for the common good into a quasi commercial adventure."

Validity of Statute Requiring Licensing of "Drugless" Practitioners but Excepting Those Treating the Sick by Prayer.—The validity of a California statute requiring that "drugless" practitioners be examined and licensed but excepting persons treating by prayer was assailed in Crane *v.* Johnson, U. S. Adv. Ops., 1916, p. 176, but was held valid, the proceeding being one for an injunction to restrain the enforcement of the statute against the complainant, who did not employ either medicine, drugs or surgery in his profession, but did employ faith, hope and the processes of mental suggestion and mental adaptation. Mr. Justice McKenna wrote the opinion of the court which was in part as follows: "It is alleged that the statute violates the 14th Amendment of the Constitution of the United States, especially the equal protection clause thereof, in that it imposes greater burdens upon complainant than upon others in the same calling and position. That it discriminates in favor of the Christian Science drugless practitioner, distinguishes between the treatment of the sick by prayer, the treatment of the sick by faith, mental suggestion, and mental adaptation, and treatment by laying on of hands, anointing with holy oil, or other kindred treatment. . . . The allegations of the bill set forth complainant's particular grievance to be that the statute discriminates between forms of healing the sick and the use of prayer and other drugless methods, and invoke the equal protection clause of the 14th Amendment of the Constitution of the United States. In other words, he attacks the classification of the statute as having no relation to the purpose of the legislation. Of course, complainant is confined to the special discrimination against him; he cannot get assistance from the discrimination, if any exist, against other drugless practitioners. The case, therefore, is brought to the short point of the distinction made between his practice and certain forms of practice, or, more specifically, between his practice of drugless healing and the use of prayer. The principle of decision needs no exposition, and the only question is whether it was competent for the state to recognize a distinction in its legislation between drugless healing as practised by complainant and such healing by prayer. That there is a distinction between his practice and that of prayer, complainant himself, it seems to us, has charged in his bill. He has not only charged that he does not employ either medicine, drugs, or surgery in his practice, but that he does employ faith, hope, and the processes of mental suggestion and mental adaptation. These processes he does not describe. Presumably they are different from healing by prayer—different from the treatment by Christian Science. But he alleges that for his practice he has become 'particularly fitted by many years of study and practice therein.' In other words, the treatment is one in which skill is to be exercised, and the skill can be enhanced by practice, and the objects of the treatment are diseased human beings whose condition is to be diagnosed. To treat a disease there must be an appreciation of it, a distinction between it and other diseases, and special knowledge is therefore required. And this was the determination of the state; but it determined otherwise as to prayer, the use of which, it decided, was a practice of religion. We cannot say that the state's estimate of the practices and their differences is arbitrary, and therefore beyond the power of government. And this we should have to say to sustain the contentions of complainant, and say besides, possibly against the judgment of the state, that there was not greater opportunity for deception in complainant's practice than in other forms of drugless healing."

Accident in Course of Employment as Including Death of Salesman on Lusitania.—The sinking of the *Lusitania* gave rise to the cause of action set forth in Foley *v.* Home Rubber Co., (N. J.) 99 Atl. 624. The proceeding was under the Workmen's Compensation Act and resulted in a judgment for the employer in the trial court which was reversed on appeal. The facts were as follows: The prosecutrix's husband, Arthur F. Foley, deceased, was in his lifetime in the employ of the respondent as a special traveling salesman and manager of its European trade. In the course of his employment it was necessary to visit the respondent's London office, which was its European headquarters. The deceased engaged passage on the *Lusitania,* which steamship was listed to steam from the port of New York to Liverpool, on May 1, 1915, under the British flag. The steamer carried passengers and ordinary freight and some cartriges for war use. There was an American steamer scheduled to steam for a British port under the protection of the American flag on the same day that the *Lusitania* was due to leave, on which American steamer the deceased might have procured passage, so far as his duties or requirements of his employment were concerned. The respondent did not instruct the deceased on what particular steamer to make the journey, but knew of the fact that the deceased had engaged passage on the *Lusitania* and offered no objection. On the 7th day of May, 1915, while the *Lusitania* was within the zone or area which had theretofore been declared the war zone by the German government, she was attacked and torpedoed by a German submarine, which caused the steamship to sink within a few minutes, and the death of the deceased was the result of the sinking of the steamship. In the court of common pleas of Mercer county, counsel for the respective parties stipulated in writing as to the facts as above related, and it was on this stipulation that the trial judge made his findings and rule for judgment for the respondent. The trial judge found that the deceased came to his death as a result of an accident not in the course of his employment. The finding made by the trial judge which gave rise to the vital question under discussion and which was the turning point of the case is as follows: "I find that the said accident did not arise out of the employment of the said deceased, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, and that the petition filed in the case must be dismissed, but without costs to the petitioner." The Supreme Court held this finding to be erroneous. Kalish, J., writing the opinion said: "Foley's presence on the ship was connected with the very employment in which he was engaged. The fact that the *Lusitania* was lost through none of the common perils of the sea, but an extraordinary peril, does not make the extraordinary peril less a cause of accident arising out of Foley's em-

ployment. Both Foley and his employer were chargeable with knowledge of the perils of war upon the high seas. They must be assumed to have known that a belligerent vessel sailing under a belligerent flag carrying contraband of war subjected the vessel to attack by an enemy vessel, and that as a result of such attack, under many contingencies recognized by the law of nations, not only the loss of the vessel attacked, but the loss of lives of those upon her, might result. The fact that the attack in this instance was not executed in a way that might have been anticipated, but in a manner said to be contrary to the law of nations, may operate to qualify the degree or nature of the danger and risk to such a peril, but does not eliminate the essential factor in the case that the voyage was one pregnant with risk which the employer must have contemplated, as arising out of and in the course of the employment. Such appears to have been the reasoning in Zabriskie *v.* Erie R. Co., 86 N. J. Law 266, 92 Atl. 385, L. R. A. 1916A, 315, holding that, where the employee left the shop and crossed a danger zone of two railroad tracks of the main line of the Erie Railroad, laid at grade, upon a much-traveled public highway, in order to reach a toilet, and was killed, that the danger and risk of the journey must have been within the contemplation of the employer. It becomes at once apparent that the fact whether or not the automobile which killed the employee was operated in a lawful manner or was lawfully upon the highway was not regarded as an essential factor in the case. In the present case, if the *Lusitania* had struck a mine instead of being torpedoed, resulting in Foley's death, could it be reasonably contended that his death was not due to an accident arising out of his employment? We think not. It may be well said that those whose employments require them to travel by land or sea are known by their employers to be subject to the common perils that such traveling incurs. The risk is inherent in the employment itself. The manner in which the accident is brought about is not at all of the essence of the master; the vital question always being, Was the accident connected with the employment?"

## New Books

*Richey's Federal Employers' Liability, Safety Appliance, and Hours of Service Acts.* Second edition. By Daunis McBride, LL.B. Charlottesville, Va.: The Michie Company. 1917.

While the treatise purports to be a second edition it is in appearance and matter a new work. The first edition was limited to the Federal Employers' Liability Act, and since at the time of its publication only about one hundred and twenty-five cases had been decided construing the act the text was necessarily meagre. At the time of the publication of this second edition there were about seven hundred and fifty cases relating to the Federal Employers' Liability Act. These furnish material for a great amount of new text. In addition the scope was broadened to include the Safety Appliance and Hours of Service Acts, and all told, the decisions which entered into the making of the new edition number nearly one thousand. These authorities have been handled with skill and rare thoroughness, and the result is a real contribution to the subject. The courts, both state and federal, are grinding out decisions every day which further construe the various acts considered in the work at hand, but the broad general principles affecting construction are we believe pretty definitely fixed and will be found clearly and admirably stated by Mr. McBride.

*The Law of Eminent Domain.* By Philip Nichols, formerly Assistant Corporation Counsel of the City of Boston. Two volumes. Albany, N. Y.: Matthew Bender & Company, Incorporated. 1917.

This work is an enlargement of a one volume edition issued by Mr. Nichols eight years ago and devoted to a discussion of the constitutional limitation upon the power of eminent domain. Mr. Nichols says that while he has had no cause to complain of the manner in which his earlier work was received by the critics of the various law reviews, or of the consideration which has been given to his opinions and conclusions by the courts of last resort of many of the states, and while it is doubtless true that a large proportion of the cases arising out of the attempted exercise of the power of eminent domain which reach the courts of last resort involve questions of constitutional law, "yet it must be conceded that in the ordinary eminent domain case such as the average attorney encounters in his practice, which involves merely questions as to the measure of compensation and the proper procedure to be employed, the volume in question was of no service whatever. The demand upon the author to extend the scope of his work so as to cover all phases of the law of eminent domain has been sufficiently insistent to induce him to attempt the task, and the present treatise is the result." Most of the treatise is confined to a discussion of the substantive law of the subject and this is because procedure is entirely statutory and no two states are alike. This second edition considers and cites about twenty thousand cases and the two volumes contain over twelve hundred pages. They sell for $15.00. We know of no other work which so thoroughly covers the subject and is so prolific of citations.

*The Statute Law of Municipal Corporations in Massachusetts.* By Frederick Huntley Magison and Thomas Tracy Bouvé. Albany, N. Y.: Matthew Bender & Company, Incorporated. 1917.

The purpose of this work has been to present in concise and convenient form the statute law of Massachusetts as it relates to municipal corporations, and to trace the growth of this law in connection with each of the principal municipal functions of government from its earliest colonial beginnings up to the present time. It is divided into twenty-six chapters and each chapter contains a historical introduction to the matter therein treated. Among the important chapter headings are: Towns; Cities; Municipal Indebtedness; Public School Department; Police Power; Department of Public Health; Roads, Streets and Bridges; Public Parks and Playgrounds; Fisheries and Game; Civil Service; and Intoxicating Liquors. More than twenty-three hundred statutes relating to municipal duties and functions are quoted. The lawyer having occasion to consult Massachusetts statute law regarding municipalities will find in this volume what he needs conveniently arranged and with historical notes of a meritorious and painstaking character. The historical notes if not the present statute law should make a wider appeal than to the Massachusetts lawyer, for the rest of New England has an interest in the early law of Massachusetts affecting municipal corporations. There are one thousand and twenty pages in the volume and the price is $10.50.

*Addresses and Papers on Insurance.* By Rufus M. Potts, Insurance Superintendent, State of Illinois.

These addresses and papers were selected from the files of the Insurance Department of Illinois and the book is printed by authority of the state for free distribution. They deal both with the fundamental and present day conditions in various branches of Insurance and were delivered or written in connection with

the special investigation of the respective subjects dealt with. To quote the author: "The papers and addresses herein have been arranged according to the historical and logical relationship of the topics treated instead of the chronological order of delivery. Consequently, 'The Altruistic Utilitarianism of Insurance,' which deals with the history and general theory of insurance, is first. This is followed by groups of addresses on Mutual and Fraternal insurance, on Workmen's Compensation, on Life Insurance, on Welfare or Social insurance, on Vital Conservation, on Fire insurance, fire insurance reform, fire prevention, recommendations concerning insurance legislation, etc."

*Principles of American State Administration.* By John Mabry Mathews, Ph.D., Assistant Professor of Political Science in the University of Illinois. New York and London: D. Appleton and Company. 1917.

The subject of this volume is an especially important one and is just beginning to get the attention it deserves. The author well says that efficient administration, formerly considered more appropriate to monarchical governments, is no less essential to a democratic government and is, indeed, intimately connected with the furtherance of true democracy. Acquaintance with the administrative activities of the American state government is of peculiar importance to every citizen of the forty-eight commonwealths, since they constantly affect his life and well-being at manifold and vital points. Professor Matthews's volume was prepared to meet the need of a treatise which should describe comprehensively and systematically the organization and functions of the state administrative authorities. It is based in part upon a college course in state administration which the author has given both at Princeton University and the University of Illinois, and in part upon researches undertaken on behalf of the Efficiency and Economy Commission of Illinois. The main divisions of the volume are "The Organization of the Administration" and "The Functions of the Administration." The former relates to the Governor, his legislative and administrative powers and his special functions; the state officers and heads of departments; state boards and commissions; selection and removal of state officers, and the state civil service. The latter division relates to taxation and finance; education; charities and correction; public health administration; enforcement of state law; administration of justice; control of corporations; labor legislation; and the promotion of agriculture and good roads. Each chapter closes with a bibliography. It is a book which can be heartily commended.

*Patriots in the Making.* By Jonathan French Scott, Ph.D., Instructor in History at the University of Michigan. New York and London: D. Appleton and Company. 1916.

The full title of this volume is "Patriots in the Making—What America Can Learn from France and Germany." The object is to show something of the relationship that has long existed in France and Germany between the school and the national consciousness. The author says: "In both these countries education has long been used as a political instrument. Prussia perceived its possibilities after the battle of Jena; France realized its value after Sedan. Both nations have employed the school to mold the mind of rising generations to a preconceived type of patriotism. The significance of the psychology thus formed is revealing itself in the present war. The experience of these countries ought not to be disregarded by the United States. After her crushing defeat in the Franco-German War, France saw clearly the danger of a blind, boastful patriotism founded on ignorance of national conditions. This sort of patriotism led to over-confidence, unreadiness, chauvinism and disaster. Hence France founded the preparedness movement, which she undertook after the war, on an intelligent, critical patriotism, carefully developed through education. Only thus did it seem possible to make adequate preparedness permanent. The lesson of this should not be lost on Americans." There is an introduction by Hon. Myron T. Herrick, former ambassador to France. The volume seems particularly opportune, as no subject could be of more pressing importance at this time. In the chapter dealing with patriotism in German education the following appears: "A careful study of official plans of instruction and of many textbooks widely used in recent years in German schools, . . . warrants the following conclusions:

"1. Patriotism, while not designated in the school curricula as a separate subject, has been systematically taught in connection with various studies, throughout all grades of instruction, from the lowest common schools to the university. The military spirit dominates this sort of teaching.

"2. The school has fostered belief in the monarchical principle and a devoted loyalty to the Hohenzollern dynasty. Doctrines deemed dangerous to the present form of government have been combated.

"3. Education has tended to develop national egotism through a glorification of German civilization and German achievements, and a failure to make due allowance for shortcomings.

"4. The school has toyed with the vision of a greater national destiny, suggesting the hope of increased power on land and sea.

"5. This apotheosis of Teutonism which has characterized German education has naturally been accompanied by a disposition to ignore or disparage other nations."

*Mediation, Investigation and Arbitration in Industrial Disputes.* By George E. Barnett, Ph.D., Professor of Statistics, the Johns Hopkins University, and David A. McCabe, Ph.D., Assistant Professor of Economics, Princeton University. New York and London: D. Appleton and Company. 1916.

This study of Mediation, Investigation, and Arbitration is based on a report submitted in June, 1915, by the writers to the Commission on Industrial Relations. The preface states that a considerable amount of illustrative material has been added, the statements have been brought down to date, and some revision has been made in the form of presentation, but the argument and the proposals remain unchanged. For convenience in comparison there are in Appendices extracts from the Final Report of the Commission, in which are presented the views of the members of the Commission on the matters there dealt with. Part one treats of state agencies of mediation, investigation and arbitration, and part two of national agencies. Part three contains the appendices where will be found among other things the Newlands Act. The volume is small, but is a critical and valuable study of the subject.

## News of the Profession

The New Jersey State Bar Association held its mid-winter meeting at Newark, N. J., on February 10.

The Louisiana Bar Association will hold its next annual convention at Alexandria, La., on May 11 and 12.

District Judge in Kansas Resigns.—Judge R. H. Hudson of the Kansas district court has resigned from the bench.

Resignation of Ohio Judge.—Judge Walter D. Meals of the Ohio Court of Appeals has resigned from the bench to resume private practice.

Virginia Jurist Resigns.—Judge George M. Harrison has resigned as a member of the Virginia Supreme Court of Appeals after twenty-two years of service on the bench.

Resignation of Tennessee Judge.—H. C. Pearson has resigned as judge of the city court of Jackson, Tenn., and Karl K. Wilks has been appointed to fill the unexpired term.

Gives up Post with State Department.—Cone Johnson has resigned his office as Solicitor for the State Department and has resumed the practice of law at Tyler, Texas.

New Law Professor at Yale.—Edmund M. Morgan, Jr., professor of law at the University of Minnesota, has accepted the offer of the chair of pleading and practice in the Yale Law School.

Appointed Additional Judge.—Robert M. Terrell of Pocatello has been appointed by Governor Alexander of Idaho as an additional judge of the Idaho district court for the Fifth judicial district.

New Judge in Ohio.—Governor Cox of Ohio has appointed Emmet L. Savage to succeed John S. Snook as common pleas judge in Paulding county. Judge Snook resigned to become a member of Congress.

Missouri Judicial Appointment.—Robert A. Pearson of Joplin has been appointed circuit judge of Jasper county, Missouri, to fill the vacancy created by the resignation of Judge David E. Blair.

Prominent New York Lawyer Dead.—Julien Townsend Davies, son of Julien Tappan Davies and a member of the well-known law firm of Davies, Auerbach and Cornell, of New York city, died at Ways, Ga., on March 8.

Appointed Member of Public Service Commission.—Governor Gardner of Missouri has appointed Judge David E. Blair of the Circuit Court of Jasper county a member of the State Public Service Commission.

Death of Prominent Chicago Jurist.—Judge John Gibbons, a prominent Chicago jurist and author, died at Chicago on February 11, aged 68. He had served on the Circuit Court bench for twenty-four years.

Appointed to Probate Bench in Ohio.—George C. Barnes of Sabina, Ohio, has been appointed to the bench of the Clinton county probate court to fill the vacancy caused by the death of Judge Levi Mills.

Chosen to Succeed Court of Appeals Judge.—Judge P. L. A. Leighley of the Court of Common Pleas has been appointed by Governor Cox to succeed Judge Walter D. Meals on the bench of the Ohio Court of Appeals.

New Probate Judge in Minnesota.—Governor Burnquist of Minnesota has appointed William B. Mather of New Ulm to the bench of the probate court of Brown county to fill the vacancy created by the death of Judge George Ross.

Georgia Judge Dead.—Walter G. Charlton, judge of the Georgia superior court, eastern district, died at Savannah, Ga., on February 11, aged 65. Judge Charlton had been on the bench since 1908, and was noted as an orator, poet and essayist.

Death of Aged Jurist.—Judge Samuel C. Parks, 96 years old, who claimed to be the oldest living graduate of Indiana University, died at Kansas City, Mo., on February 8. He presided in 1863 over the first court ever held in the territory of Idaho. Judge Parks was an intimate friend of Abraham Lincoln.

Change in English Judiciary.—Sir Maurice Hill, K. C., has been appointed a judge of the High Court of Justice (Probate, Divorce, and Admiralty Division), in the place of Mr. Justice Bargrave Deane, resigned. Sir Maurice was called by the Inner Temple in 1888, and took silk in 1910.

Appointed to Bench in Georgia.—Governor Harris of Georgia has appointed General Peter W. Meldrim of Savannah as judge of the Superior Court of Chatham county to succeed the late Judge Walter G. Charlton. General Meldrim is one of the most distinguished lawyers in Georgia and is a former president of the American Bar Association.

Iowa Judge Dead.—Judge Horace E. Deemer, the oldest member, in point of service, of the Iowa Supreme Court, died at Red Oak, Iowa, on February 26, aged 58. Judge Deemer had been a member of the Iowa Supreme Court since 1894, and was chief justice during the years 1898, 1904, 1910 and 1915. He was re-elected for a six-year term last November.

Death of Ambassador Guthrie.—George W. Guthrie, American Ambassador to Japan since 1913, died suddenly at Tokio, Japan, on March 8, aged 69. Mr. Guthrie was a Pittsburgh lawyer and was prominent in national Democratic politics. He was internationally known for his activities in Masonic bodies, and was a Past Grand Master of Pennsylvania Masons.

Death of Distinguished Mississippian.—Judge W. H. Hardy, father of Corporation Counsel Lamar Hardy of New York city and known as the "Father of Gulfport," died on February 18 at Gulfport, Miss., in his eighty-first year. Judge Hardy was for many years active in public affairs in Mississippi, where he served as President of the Senate and later as judge of the Circuit Court of the Southern District.

Belgian Senator Honored.—At the annual reception of the alumni of the Law School of the University of Pennsylvania, held at Philadelphia, on March 2, the guest of honor was Henri La Fontaine, of the Belgian Senate, professor of international law at the University of Brussels, president of the International Peace Bureau and recipient of the Nobel Peace Prize in 1913. Senator La Fontaine delivered an address on "When War Will No Longer Be Considered a Legal Process."

## English Notes*

Women and the Bar Meeting.—By an overwhelming majority at a fully attended meeting of the Bar, the proposal that the General Council should consider and report on the desirability of making provision for the admission of duly qualified women to the Profession was rejected. As was pointed out, with practically every member of the Bar of military age away serving his country, the present time was inopportune to bring forward a matter of this kind. Sir F. E. Smith, in his opening speech to the meeting, laid stress on the fact that the Military Service Acts found little material left in the Legal Profession. As formerly, the law was ready to come forward voluntarily for its country, and at the present time 1300 barristers are serving in His Majesty's forces, while 122 have already laid down their lives. Those older members of the Profession who attended the meeting showed in no uncertain manner that in the absence of the younger members a motion of this description was not to be tolerated.

*With credit to English law periodicals.

Evidence by Affidavit in Divorce.—It is quite clear that the Matrimonial Causes Act 1857 does not entitle a petitioner as of right to prove his case by affidavit, but whether leave should be given for evidence to be adduced in this way must depend on the circumstances of each particular case, on which the judge must exercise his judicial discretion. In the case of Gayer *v.* Gayer, recently before the Court of Appeal, the witnesses necessary to prove adultery were in New York, and the Master of the Rolls and Lord Justice Warrington were of the opinion that it would not be a reasonable ground for admitting an affidavit proving such adultery that the expense of a commission to the United States would be saved. Mr. Justice Shearman, before whom the matter had come, had refused to make an order, but invited guidance from the Court of Appeal. It is quite true that divorce causes stand in a very different position from other disputes between litigants, but it is difficult to see how the risk of collusion would be reduced by evidence in an undefended case being taken on commission, where no cross-examination took place, more than if such evidence were set forth in an affidavit. It would appear that the dissenting judgment of Lord Justice Scrutton had more to commend it than the decision of the majority of the court. The learned Lord Justice took the view that it should be the aim of the court to make its justice as cheap and accessible as was consistent with a reasonable amount of security against its being deceived. With this pronouncement doubtless most of the Profession will agree.

The Great Seal.—The Order in Council gazetted recently, whereby it is provided that general full powers to His Majesty's representatives below the rank of ambassador and special full powers issued for use on any particular occasion only are to be sealed with the wafer seal, is in further pursuance of the policy of a sparing use of the Great Seal decreed by Order in Council in September last by which a wafer Great Seal was substituted in the case of certain documents for the Great Seal. The use of a wafer Great Seal for economic purposes was in 1900 stated in the House of Commons as the reason for the Great Seal which was then in use and regarded as worn out, having been available for nearly twenty years, or twice as long as the average time during which previous Great Seals had lasted. The cost of the new Great Seal then made, which, of course, on the demise of the Crown by the death of Queen Victoria in January, 1901, had to be substituted for another Great Seal, was £400. There was, of course, yet another Great Seal on the succession of His present Majesty in 1910. The disused Great Seals, which are rendered inefficient by being "damasked" —that is to say, subjected to a gentle blow of a hammer by the Sovereign—are disposed of as the Sovereign may think fit. They become all but invariably the perquisites of the Lord Chancellor of the time. A new Great Seal, which was ordered when Lord Lyndhurst was Lord Chancellor, did not come into use till the Chancellorship of Lord Brougham. The Sovereign, King William IV., directed the obverse and the reverse of the damasked Great Seal to be converted into magnificent pieces of plate and to be given one piece to Lord Brougham and the other to Lord Lyndhurst, the respective ownership of the pieces to be decided by lot.

Compulsory Tillage in Ireland.—The intended establishment in Ireland of a system of compulsory tillage of a certain proportion of arable land, under the powers of the Defence of the Realm Act, is of interest to students of constitutional development as one of the many illustrations of a return, under the necessities of modern environments, to the legislative remedies of former generations. The compulsory tillage scheme is only an adoption of the attempted legislation of the Irish Parliament in the early decades of the eighteenth century, which was, however, resisted by the English Government under the operation of Poynings' Act, whereby a bridle was placed in the mouth of the Irish Parliament. In 1716 the Irish House of Commons passed a resolution unanimously that covenants which prohibited the breaking of the soil with the plough were impolitic and should have no binding force. They passed heads of a Bill—they could not pass Bills which had not been approved by both English and Irish Privy Councils—which they recommended with the utmost earnestness to the consideration of the English Privy Council. The Irish Privy Council was favorable, enjoining that for every hundred acres which any tenant held he should break up and cultivate five, and, as a further encouragement, that a trifling bounty should be granted by the Government on corn grown for exportation. The Bill, which was long delayed by the English Privy Council, notwithstanding the indignant remonstances of the Lord-Lieutenant of Ireland, was at last sent back, but a clause had been slipped in empowering the Council to suspend the premiums at their pleasure, and the Irish House of Commons in disgust refused to take back a measure which had been mutilated into a mockery. The wretched Bill, shorn of the bounties which would have given it vitality, at last became law in 1729. As, however, no means were provided to enforce the obligation of placing a certain proportion of land under the plough, it remained a dead letter.

Purchase by Trustee from Co-trustee, Who is also Cestui Que Trust.—It is well settled that a trustee cannot purchase the trust estate from his cestui que trust, unless he gives full value, and discloses all the necessary particulars, and derives no advantage to himself by reason of his position. But does that rule apply, in its integrity, if the cestui que trust is also a trustee? In Re Biel's Estate; Gray *v.* Warner (28 L. T. Rep. 835; 16 Eq. 577) the facts were shortly as follows: M. B. bequeathed £1000 to E. D. B., one of her executors, T. W. being the other executor. T. W. in consideration of £700, part of the legacy of £1000, agreed to grant an annuity to his co-executor E. D. B., whose life he knew was a bad one. It was argued that, as E. D. B. and T. W. had equal dominion over the fund dealt with, they were dealing with each other on equal terms; but Vice-Chancellor Wickens in the course of his judgment said that if a trustee purchases from a cestui que trust he takes on himself the onus of proving the fairness of the transaction, and he could not see that T. W. was relieved from that burden because his cestui que trust was also his co-executor. The point came before Mr. Justice Eve in the comparatively recent case of Bruty *v.* Edmundson (113 L. T. Rep. 1197). That was an action by the assignee of a son to set aside a resettlement of property by the son and his father, and a subsequent purchase by the father of the son's interest under the resettlement. The father and son were both trustees of the resettlement. Mr. Justice Eve in the course of his judgment said he had no doubt that one must pay regard to the fact that the selling cestui que trust is also a trustee with the purchasing trustee; but he was quite satisfied that the mere coincidence did not neutralize the fact that it was a transaction between cestui que trust and trustee. In that particular case his Lordship attached very little weight to the element of the fact that the father was a trustee for his son. He thought it was to a very great extent neutralized by the fact that the son was his co-trustee, and that the knowledge of each, of the trust premises, and the trust estate, was about equal. It appears, therefore, that the question whether the rule applies in its integrity, where the cestui que trust is also a trustee, depends on all the circumstances of the case.

The Mace of the House of Commons.—The new mace for the Canadian House of Commons, which is a replica of the old one destroyed by the fire which last year demolished the Dominion Parliament House at Ottawa, has been presented to the High Commissioner of the Dominion, Sir George Perley, as the gift of the Lord Mayor of London and the two High Sheriffs at the time of the fire, who offered to provide a new mace. The symbolic significance of the mace of the House of Commons is little known. There is an intimate relationship between the mace of the Speaker and Parliamentary proceedings which is little known even in well-informed political and legal circles. "When the mace," writes Hatsell, "lies upon the table it is a House; when under it is a Committee. When the mace is out of the House no business can be done; when from the table and upon the Serjeant's shoulder the Speaker alone manages." In earlier times it was not the custom to prepare a formal warrant for executing the orders of the House of Commons, but the Serjeant arrested persons, with the mace, without any written authority. When, moreover, the Speaker is accompanied with the mace he has power to order persons into custody for disrespect or other breaches of privilege committed in his presence without the previous order of the House. Thus Mr. Speaker Onslow ordered a man into custody who had pressed on him in Westminster Hall. Delinquents are brought to the Bar of the House for the reprimand of the Speaker by the Serjeant with the mace. The present mace dates from the restoration of Charles II. After the death of Charles I. in 1649 a new mace had been made, which was the celebrated "bauble," taken away by Cromwell's order on April 19, 1653, and restored on July 8 of the same year. It was said that the "bauble" of the Cromwellian period had been discovered in Kingston, Jamaica, where it was in use as the mace of the House of Assembly, but from inquiries made on the subject by Mr. Speaker Peel in 1890, it was discovered that the two maces then existing were both of the Georgian era. The mace is held in the custody of the Crown when Parliament is prorogued. The mace of the Irish House of Commons is now at Antrim Castle, the seat of Viscount Massereene and Ferrard, where it is preserved as an honored heirloom. The last Speaker, the Right Hon. John Foster (Lord Oriel), a determined anti-Unionist, refused to surrender "the bauble" to any but the constituted authority by whom it had been intrusted to his keeping, and consequently it has descended to his representative and great-grandson, Lord Massereene and Ferrard.

America and the Severance of Diplomatic Relations.—The breaking off of diplomatic relations between the United States and Germany, accompanied with the recall and dismissal of the ambassadors of the respective nations, is naturally regarded as the last step before actual hostilities, although there are instances in which this stage has been reached and in the end peace maintained. While the first act of hostility determines the commencement of the war, so far as third parties or States are concerned, it has become usual for each Government to issue a proclamation or manifesto in which it endeavors to show its good faith and to expose the bad faith of its adversary. Such manifestos are loosely spoken of as declarations of war, and usually fix the duties of neutrals. On account, however, of the provision in its Constitution giving power to Congress to declare war, formal declarations will probably remain usual with the United States and other nations with like institutions. In the short lived Constitution under which Napoleon proposed to reign after his reascension in 1815 there was a similar provision. The various stages in the crisis in the United States mark and emphasize the distinction between the Cabinet and the Presidential system of government as expounded by Mr. Bagehot. "The independence of the legislative and executive powers is," he says, "the specific quality of Presidential government, just as their fusion and combination is the precise principle of Cabinet government." This position is illustrated by the following cablegram from Washington received on the 3rd inst.: "Immediately after a meeting of the Cabinet [chosen by the President and holding office at his pleasure and members of neither Chamber of Congress] President Wilson hurried to the Capitol to discuss the situation with Mr. Stone, chairman of the Foreign Relations Committee of the Senate. It appears that Mr. Stone had been assured that he and his committee would be consulted before any serious action was taken." Mr. Bagehot, writing in 1865, thus comments by way of anticipation, albeit unconsciously, on the unavoidable drawbacks of this system: "After saying that the division of the legislative and the executive in Presidential Governments weakens the legislative power, it may seem a contradiction to say that it also weakens the executive power. But it is not a contradiction. The division weakens the whole aggregate force of government—the entire Imperial power—and therefore it weakens both its halves. The executive is weakened in a very plain way. In England a strong Cabinet can obtain the concurrence of the Legislature to all acts which facilitate its administration. It is itself, so to say, the Legislature. But a President may be hampered by the Parliament, and is likely to be hampered. The natural tendency of the members of every Legislature is to make themselves conspicuous. They wish to gratify an ambition, laudable or blamable; they wish to promote the measure they think best for the public welfare; they wish to make their will felt in great affairs. All these mixed motives urge them to oppose the executives. They are embodying the purposes of others if they aid; they are advancing their own opinions if they defeat. They are first if they vanquish; they are auxiliaries if they support." In these words, written more than fifty years ago, is contained a well-considered exposition of the reasons which must stimulate the desire of anyone occupying the position of President of the United States to make sure that in matters of foreign policy he will be supported by Congress before he commits his people, and to discover the opinion of the country before he takes action.—*Law Times.*

## Obiter Dicta

Ought to Be Reversed.—Chaplin *v.* Shoot, 3 H. & M. (Md.) 350.

On the Outside Looking In.—Bryan *v.* Washington, 15 N. Car. 479.

An English Sparrow?—Ancient Order of Hibernians *v.* Sparrow, 29 Mont. 132.

So He Was.—In Good Shot *v.* United States, 104 Fed. 257, the plaintiff in error was convicted of murder.

How to Swear in New York.—See section 845 of the New York Code of Civil Procedure, entitled "General Mode of Swearing."

Deathly Wit.—"Litigation resulting from the homicide of Joseph New is no new thing in this court."—Per West, J., in New *v.* Smith, 94 Kan. 17.

Recipe Wanted!—"People would be more apt to give him money than to try to take any away from him."—See In re Estate of Barrett, 167 Iowa 221.

Prima Facie Guilty.—The case of In re Shirk, 5 Phila. 333, was a hearing on a writ of habeas corpus to secure the release from military custody of a deserter from the army.

Psychopathic Queries.—Is a decision by Judge Pound of the New York Court of Appeals entitled to any extra weight? When Bartlett of the same bench retired, did the court lose one judge or a pair?

A Long Sitting.—Said the Defiance (Ohio) *Democrat* recently: "Judge C. W. Palmer entered the court house Friday morning to remain on the probate bench four years. If the berth proves satisfactory and if the people like his services, he will stay there four years more."

"That Youth's Sweet Scented Manuscript Should Close."—In Munro *v.* Beadle, 8 N. Y. S. 414, after listing by title a number of publications in the "Old Sleuth Library," Macomber, J., said: "Happily no point is made by considerate counsel which requires us to look into these several publications."

Easily Satisfied.—"In passing upon this matter I now have the exquisite satisfaction of reviewing myself."—Per Crane, J., in Matter of Norton, 97 Misc. (N. Y.) 289. Queer sort of satisfaction, as it turned out, for the learned judge found it necessary to modify his former opinion.

"The Lady Doth Protest Too Much, Methinks."—"A judiciary which has not independence sufficient to protect the rights of rich men, when they are believed to be unjustly assailed, cannot be trusted to justly protect either the personal or property rights of the well-to-do or poor."—See Rockefeller v. O'Brien, 224 Fed. 554.

Not a Canute.—In McKinney *v.* Adams, 68 Fla. 208, an action against the proprietor of a bathing resort to recover damages for the death of a patron while bathing, the defendant demurred to the declaration, solemnly alleging inter alia as follows: "The Atlantic Ocean is in no sense a bathing place or resort operated or controlled by defendant."

When You Are Asked to Endorse a Note.—"Almost all who sign as surety have occasion to remember the proverb of Solomon: 'He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure.' But they are nevertheless held liable upon their contracts, otherwise there would be no smarting, and the proverb would fail."—Per Appleton, C. J., in Mayo *v.* Hutchinson, 57 Me. 546.

Speaking of Autos.—In Hirshman *v.* Beal, 38 Ont. L. Rep. 48, Riddell, J., speaking of the Ontario Motor Vehicles Act, said: "This very stringent legislation makes the ownership of a motor vehicle distinctly more dangerous than the ownership of a rattlesnake." The comparison loses much of its force when one remembers that a certain kind of motor vehicle is often called a "rattler." But perhaps the "flivver" has not yet arrived in Canada.

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A Female Corporation.—We have heard all kinds of epithets hurled at corporations, but the following characterization is unmanly, to say the least: "The fact that this company buys powder to sell it at a profit brings her clearly within the letter and the spirit of the statute, nor is she relieved from the burdens imposed by the statute because she confines her sale to her own employees."—See Delaware and Hudson Canal Company's Case, 8 Pa. Co. Ct. 496.

Defining a "Good" Fence.—In Shedd *v.* Alexander, 270 Ill. 127, the Illinois Supreme Court, holding according to the syllabus that "a poor fence may evidence adverse possession," sheds some light on what fences ought to be in the following remark: "It is true that the fences enclosing the premises in dispute were not of the best, as shown by the evidence, but while they may not have been hog tight, horse high or bull proof, we are not prepared to say that they were not sufficient for the purpose of holding possession or as visible evidence of possession in connection with the actual occupancy of the land."

Grandiloquent but Unconvincing.—In People *v.* Austin, 1 Parker Crim. (N. Y.) 168, a prosecution for murder, the court in its charge to the jury condemned the practice of carrying deadly weapons and perorated thus: "Far better the land though stricken with poverty, where the unseen majesty of the law affords its sure protection to all, and where the atmosphere of its supremacy pervades every tenement however humble, than that where gold may be gathered at every footstep, but where every man is armed to the death against his fellow, where every breath is drawn amid the rattling of armor, and every pulsation beats with the apprehension of instant conflict." However and nevertheless, the jury brought in a verdict of not guilty.

Poetry Vel Non.—In Willis *v.* O'Connell, 231 Fed. 1008, which was an action to restrain the publication of certain adverse criticisms of the plaintiff's proprietary medicine, Clayton, J., quoted one of the criticisms complained of and commented on it as follows:

"'*A Recipe that will Save You a Dollar.*

'Take alcohol, liquor or plain tiger booze,
And label it "Tan-lac," for "internal use,"
Not forgetting to add in the smallest dimension
Licorice, glycerine, aloes and gentian,
And when you have finished you'll find you've devised
Common old whisky but thinly disguised.'

Let me remark in passing that doubtless this doggerel would inflict much pain upon the sensibilities of a teacher of belles lettres, and should not, in his opinion, be allowed to go to print. He would doubtless say that it does not even possess the swing and jingle, the atoning grace, of a limerick." Whatever one may call it, the verse is better than a good deal of the modern poetry, and we may add that the learned judge refused to enjoin its publication.

Dead Dog.—In Alabama Great Southern R. Co. *v.* Price, 88 S. E. 692, an action to recover damages for the alleged killing of a dog, the evidence showed that the animal was found dead in close proximity to the track of the defendant railroad but without any apparent bruise or blemish on its body. In reversing a judgment in favor of the dog's owner, Judge Wade of the Georgia Court of Appeals thus portrays the evil results that would ensue from a contrary holding: "To hold that the mere discovery of the body of a dog near the track of a railroad company would authorize a recovery against the company for its killing, in case the dog had been seen alive thirty minutes before its body was there found, would establish a rule harsher than any we

know, and would open the way for boundless frauds, for designing and unscrupulous persons might breed dogs of every variety,

'Both mongrel, puppy, whelp, and hound,
And curs of low degree,'

for the purpose of chloroforming or poisoning them, and might distribute their inanimate bodies along the tracks of various solvent railroads throughout the state, and possibly recover damages beyond computation, for their supposed violent destruction." Proceeding, Judge Wade indulges in various surmises as to the actual cause of the dog's death (we fail to observe any mention of suicide) as follows: "All things that live must die, and so too all living things will die a natural death, unless some extraneous cause or agency intervenes, and a dog is not exempt from the operation of the universal rule. We may surmise that the particular dog we are interested in may have had some deadly poison administered to it either by accident or intention, and the poison may have destroyed its life just as it neared the railroad track, in proximity to which its body was found; or the dog may have died from 'heart failure' (that comprehensive term so often used by the medical profession to account for mysterious and sudden departures from this little world), or from any one of many different natural causes; for the poetic expression, 'death hath a thousand doors to let out life,' applies equally as well to the canine as to the human race." Finally, the court sums up the whole matter in this convincing manner: "Since no mark of violence was found on the body of the dog, and there is no other circumstance in proof from which a clear inference could be drawn that the dog was struck by the locomotive or cars of the defendant company, in order to conclude, in the absence of any further testimony, that the dog was in fact killed by the running of the train of the defendant, we would be practically compelled to hold judicially that the very atmosphere surrounding a railroad train is as deadly as that said to emanate from the upas tree, and that a railroad company can be held liable for death supposed to have resulted solely from the pestilential breath of its locomotive."

## Correspondence

### CONTINUOUS SERVICE ON THE BENCH

February 21, 1917.

*To the Editor of* LAW NOTES.

SIR: I notice a statement in LAW NOTES for February that the forty consecutive years of service by Chief Justice Frank A. Monroe, of the Louisiana Supreme Court, is asserted to be a record not equaled by any magistrate in the United States.

I find it recorded in Volume 3 of "Great American Lawyers," at page 113, that Judge William Cranch, Chief Judge of the United States Circuit Court for the District of Columbia, served as a Judge of that court for fifty-four years and six months. Other terms of judicial service exceeding forty years are also referred to at the same point.

Judge James Keith, formerly President of the Court of Appeals of Virginia, who resigned as such on June 12, 1916, had served continuously for forty-six years as a judge in this State, more than twenty-one years of this period as President of the Court of Appeals of Virginia and the residue as a circuit judge.

HENRY C. RIELY.

Richmond, Va.

*To the Editor of* LAW NOTES.

SIR: Judge Henry Potter was appointed Judge of the District Court of this State by President Jefferson 1801 and presided, without interruption, until his death 1858. This, so far as my information goes, is the longest service on our judicial records. He was succeeded by Judge Biggs, who resigned, April, 1861, but survived his resignation until 1878—hence, but for his resignation, the Court from 1791, when Judge Sitgreaves was appointed, until 1878, a period of 87 years, would have had but three judges. Judge Brooks, succeeding Judge Biggs, died 1882, therefore, during a period of ninety-nine years, we had but four judges.

H. G. CONNOR.

U. S. Court, Wilson, N. Car.

*To the Editor of* LAW NOTES.

SIR: In the last two editions of LAW NOTES, you have drawn attention to "Long Continuous Service" on the Bench. I think you will find Judge Hascal R. Brill, the presiding Judge of the Ramsey County Bench of Minnesota, has had continuous service of forty-two years.

FRANK ARNOLD.

Livingston, Mont.

### AFFIRMANCE OF DIVIDED COURT

*To the Editor of* LAW NOTES.

SIR: In LAW NOTES for March is an editorial entitled "By a Divided Court," and treating of the railway mail case that is generally spoken of here as the "divisor case." In the course of the editorial it is stated: "Incidentally, it is said that this is the first time in the history of the Supreme Court that a case has failed of decision because of an equal division of opinion among the Judges." If any one said such a thing, he was mistaken, for many cases have been disposed of there by an equally divided court. Some of these cases are named in Hertz *v.* Woodman, 218 U. S. 205, where the wholesome rule is laid down that an affirmance by an equally divided court is as between the parties a conclusive determination and adjudication of the matter adjudged, but the principles of law involved, not having been agreed upon by a majority of the court sitting, prevents the case from becoming an authority for the determination of other cases, either in the Supreme Court or in the inferior courts.

L. T. MICHENER.

Washington, D. C.

"So long as a nation does not interfere in the war, but professes an exact impartiality toward both parties, it is its duty, as well as right—and its safety, good faith, and honor demand of it—to be vigilant in preventing its neutrality from being abused, for the purposes of hostility against either of them. This may be done, not only by guarding, in the first instance, as far as it can, against all warlike preparations and equipments in its own waters, but also by restoring to the original owner such property as has been wrested from him by vessels which have been thus illegally fitted out." Livingston, J., The Estrella, 4 Wheat. 309.

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WATSON E. COLEMAN,

PATENT LAWYER 624 F Street, N. W., Washington, D. C.

# Law Notes

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### Pistols and Preparedness.

IN several states there has been some agitation for the enactment of a law prohibiting the possession of pistols or revolvers, and in Kansas a bill to that effect has been introduced. The argument in favor of such a measure is that a person in possession of a weapon is liable on occasion to use it in a rash and unlawful manner. This is precisely the argument advanced by the opponents of national military preparedness, and in that application its fallacy has been exposed by the logic of recent events. Disarmament does not prevent war. It encourages the incursion of the predatory and sends the sons of the deluded nation out empty-handed to defend their homes. Just so, on a smaller scale, these anti-pistol acts might well be termed laws for the protection of the lawless. New York has had such a law for years, yet "Gyp the Blood" and his like have no difficulty in obtaining a gun when they need it. The criminal who is risking the gallows or the penitentiary laughs at the added penalty of the anti-pistol act, and laughs again when he thinks that it probably insures that his intended victim will be unarmed and helpless. If every householder had a good weapon and was trained to use it, burglary and its attendant crimes would decrease rapidly. If the present national crisis teaches us to put a quietus on the misguided individuals who are injecting the serum of milk and water into our national blood it will have served a good purpose.

### Naturalization of Alien Enemy.

THE right of German citizens in the United States to naturalization since the declaration of war has become the subject of considerable discussion. The statute (Rev. St. §2171, 5 Fed. St. Ann. 208) provides quite explicitly that "no alien who is a native citizen or subject or a denizen of any country, state or sovereignty with which the United States are at war at the time of his application shall be then admitted to become a citizen of the United States." There have been but few decisions interpreting the act, all arising out of the war of 1812. In Ex parte Newman, 2 Gall. (U. S.) 11, Story, J., held that an alien enemy cannot even make the preparatory declaration of intention, since he "has no legal standing in court to acquire even inchoate rights." In the case of In re Little, 2 Browne (Pa.) 218, it was held that though an alien enemy cannot be actually naturalized he may make the preliminary declaration, since "he gains no personal privileges in consequence thereof." See also Ex parte Ovington, 5 Binn. (Pa.) 371. Whatever may now be decided as to the right to make a declaration of intention, the statute seems unmistakable in denying the right to naturalization under an ante bellum declaration. That construction is strengthened by the fact that an act of July 30, 1813, added a proviso to the statute heretofore quoted authorizing the naturalization of aliens of enemy nativity who had prior to June 18, 1812, made a declaration of intention. By the rule of expressio unius, that explicit and limited exception precludes the implication of any general exception.

### Insolvency Caused by War.

THE English Parliament has passed a number of acts modifying civil liabilities to meet the exigencies of war, and some similar legislation may be found necessary in this country. One of the most interesting of these measures is a provision that if a person against whom a petition in bankruptcy is presented proves that his inability to pay is due to the present war the Bankruptcy Court may stay proceedings under the petition. See In re Silber, [1915] 2 K. B. 317, wherein the act was interpreted and applied. Many possible conditions can be imagined whereby a condition of war would render a solvent trader temporarily unable to meet his obligations,—debts due from persons who have become alien enemies, inability to ship goods because of an enemy blockade or a government embargo, or the like. Such a person certainly should not be forced into liquidation, and a provision similar to that of the English act might well be embodied in whatever emergency measures Congress may enact.

### Labor Legislation Sustained.

NOT the least important paragraph in the recent decision of the Supreme Court sustaining the validity of the Adamson law is that wherein the power of Congress as to industrial arbitration was asserted. Chief Justice White said:

"Being of the opinion that Congress had the power to adopt the act in question, whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject resulting from the dispute between the parties or as the exertion of power by Congress, which it undoubtedly possessed, to provide by appropriate legislation for compulsory

arbitration—a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it—we conclude that the court below erred in holding the statute was not within the power of Congress to enact and in restraining its enforcement, and its decree therefore must be and it is reversed and the cause remanded with directions to dismiss the bill, and it is so ordered."

That pronouncement points out the way in which to make effective the words of Mr. Justice Brewer in a "strike" case (In re Debs, 158 U. S. 564): "It is a lesson which cannot be learned too soon or too thoroughly, that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the co-operation of a mob with its accompanying acts of violence." The power of a state to require of employers the rendition of the fullest industrial justice is affirmed in two further recent decisions of the federal Supreme Court, sustaining statutes of Oregon which fixed a minimum wage for women and a maximum working day for factory employees. The broad field of permissible regulation opened up by the decisions referred to, in connection with the patriotic attitude assumed by the responsible leaders of organized labor in the present war, goes far toward insuring a better era in which economic justice will be rendered to all, in an honest, sane and orderly way.

#### Verboten.

As an inevitable result of past carelessness in the training of youth, our statute books are now filled with vain attempts to prohibit in the man things which could have been minimized by a proper education of the boy. An Ohio municipal judge, speaking from years of observation of the attempts to regulate civic vice, said recently in opposing an abatement measure designed to eliminate houses of prostitution:

"The only way to keep a duck from taking to water, is for God Almighty to change the constitution of the duck. You are dealing with the oldest known evil, one co-existent with society itself. The remedy is with you preachers; education is the only remedy."

Another possible consequence of the multiplication of petty offenses has been suggested by one whose utterances on the subject are worthy of attention.

"Policemen 'snooping' around the corners for violations of minor ordinances are in danger of tripping over dead men shot in burglaries and robberies," said Judge Harry Olson, chief justice of the Municipal Courts of Chicago, in a recent address before the New York State Bar Association.

That does not mean that minor offenses must be tolerated or that the brothel must forever exist in the shadow of the cross and the flag. It means that the elevation of individual ideals will make unnecessary many prohibitions which as bare prohibitions are well nigh useless.

#### Juvenile Courts.

In September, 1632, Galileo, compelled under threat of torture to recant his heretical assertion that the earth moves around the sun, turned from the chamber of the Inquisition muttering: "But nevertheless it does move." Within the present generation a negro preacher in Virginia won some local celebrity by a series of sermons asserting that the sun revolves around the earth. Thus long is the span of years between the birth of truth and the death of error. So, although juvenile courts and probation laws have received the acclaim of students of sociology and have vindicated themselves in practical operation, it is not surprising that there should be an occasional outburst of opposition. A Chicago periodical, devoted principally to a single business interest, has begun a series of articles violently attacking the juvenile court of that city. The argument seems to be that the juvenile court law is an unwarranted invasion of family rights, and in particular that it subjects to legal restraint and supervision boys guilty only of stealing fruit, or similar supposed concomitants of normal childhood. Several important factors are lost sight of in this viewpoint. It is of course true that very many boys guilty of such acts have become in due time most worthy citizens. But does not the memory of almost every person recall some boyhood acquaintance who "went to the bad" from those beginnings, and who might have been saved by a timely restraint? And with the others, how much of the want of ethics in business, the lack of respect for law, which characterize the present generation, is due to the fact that no just regard for the rights of others was inculcated during the formative years? Moreover, with the increasing congestion of population in large cities, the childish offenses which were harmless enough with respect to permanent effects in a small village take on much more of evil tendency. Where once it was but an occasional boy who thus sowed the seed of future crime, the proportion is vastly increased under modern conditions. Compulsory education and truancy laws were once unnecessary. Would any one now advocate their abolition because many good men once "played hooky"? Slowly but surely the civic ideal of America is broadening, the vital interest of the state in the physical, mental, and moral welfare of every citizen is coming more and more to be recognized. In health regulations, in factory laws, in education laws, that recognition is finding expression, and in none more plainly than in the juvenile court laws.

#### The Chicago Court.

The Boys' Court of Chicago, a branch of the Municipal Court, at which the criticism heretofore referred to is primarily leveled, needs no defense to any person familiar with its work. A few desultory extracts from its latest report, a document which should be in the hands of every student of sociology, may however be of interest. In view of the general idea that juvenile offenses are ipso facto petty in character, the number of felonies coming in the first instance before the court is surprising,—1374 in 1914 and 1784 in 1915. The utility of the initial sifting by the Boys' Court is shown by the fact that 1045 of these were discharged on investigation without resort to the criminal courts. Another item worthy of notice is the number of boys discharged on the first hearing, showing the disposition of the court to protect the youth from unwarranted police interference. The chief justice in his report refers to "the large number of arrests by the police for trivial causes" and the measures taken by him to check the practice. What would happen were those so arrested handled according to the methods prevailing before the institution of the juvenile court may be left to the

imagination. Another surprising feature is the number of defectives among those brought into the court. Thus one selected group of 126 showed an average chronological age of 18.95 with an average mental age of 12.6. Among the number were alcoholics, sexual perverts, drug habitués and the like. About 25 per cent had a history of arrests in other courts. Other selected groups showed similar results. The idea that individual rights are invaded and domestic privacy outraged by bringing these unfortunates under intelligent supervision is, to put it mildly, shortsighted.

Respecting the work of the probation officer, the report shows that of a group of 701 put on probation, after the commission of offenses ranging from larceny and assault to fornication and frequenting disorderly houses, 537 were discharged as improved, 142 showed no improvement, 21 were sent to a house of correction and one to the reformatory.

#### Price Control—Finis.

WE have commented several times in these columns on the ruthless submarine war which has been waged on the purse of the ultimate consumer by means of manufacturers' price control contracts. It was thought that a quietus had been put on that activity by the decision in the Sanatogen case. But, finding encouragement in the decision of four justices out of seven in the Dick Mimeograph case, the proprietors of certain patented articles sought by ingenious "licensing" schemes to control the reselling price, such a method receiving the sanction of the Circuit Court of Appeals of the Second Circuit in *Victor Talking Mach. Co.* v. *Strauss,* 230 Fed. 449. But on a further appeal in that case the federal Supreme Court has declared that the so-called license was a palpable evasion, and has pronounced the entire scheme illegal. Incidentally, the Dick Mimeograph case was overruled. The previous decisions on the subject were by a divided court, and some uncertainty necessarily arose from the recent changes in the personnel of the court, particularly in view of the fact that Mr. Justice Hughes was in the previous decisions other than the Dick case the spokesman of the court. By the recent decision the illegality of price control agreements, in however ingenious a guise, may be considered as finally settled.

On the economic side, the advocates of price control have been insistent in urging the sophistry that price reduction on one article is merely a bait to obtain an excessive price on others. In the Cream of Wheat case it appeared in evidence that, by economy of selling methods, the proprietors of a chain of grocery stores were able to make a profit of 9½ per cent at the reduced price at which they sold Cream of Wheat, while a sale at the price which the manufacturers sought to impose realized a profit of 29 per cent. The claim that the public welfare is served by compelling a retailer to exact 29 per cent profit on an article of food when he is willing to accept 9½ per cent is of a piece with the legal theory which the Supreme Court has so effectually exploded.

#### Legal Status of Tips.

CONSIDERABLE interest has been manifested by a recent decision of the New York Appellate Division on the subject of "tips." The precise holding was that the tips habitually received by a taxicab driver formed a part of his average earnings for the purpose of computing the amount to be paid under a Workmen's Compensation Act in the event of his death. The doctrine of that case is not novel; precisely the same holding was made as to the tips of a waiter in England in 1908. (*Penn* v. *Spiers* [1908] 1 K. B. 766, 14 Ann. Cas. 335.) But in deciding the point the New York court said:

"The person rendering the service considers that the tip is his as a matter of right, and involves no particular favor. An extra large tip may be appreciated, but the ordinary tip is considered a payment of money actually due. The usual tips have come to be considered a part of the cost of the entertainment at a hotel, upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them that it is a part payment of the wages which the employer compels the person served to pay."

How far the court is right in its idea of the manner in which tips are regarded by their recipient is a matter of individual experience. But the decision is very far from establishing the tip as a legal right, as some lay writers have assumed. At any time when it fails in the experience of the giver to produce good service it will be discontinued, and if anyone should perchance sue to recover it he would doubtless find the New York court aligned solidly against a recovery.

#### Torture of the Condemned.

AS to the propriety or necessity of capital punishment there are two opinions, albeit the affirmative is largely based on tradition. There can, however, be but one opinion as to the propriety of humane treatment of a condemned man prior to his execution. This admitted, the question is being asked by an ever-increasing body of publicists and humanitarians whether our present methods of dealing with condemned men do not actually savor of inhumanity. Their argument runs something like this: "In many states the condemned are confined in a state prison from sentence till execution. This involves an exclusion from the visits of relatives unless they can stand the burden of a long and expensive journey, and a deprivation of the benefit of consultation with counsel, who cannot be expected to make trips to the penitentiary at their own expense. In New York and perhaps other states a far more grievous cruelty is added. The condemned are kept in a special group of cells. Perchance a year elapses while an appeal is being heard—Molineux spent two years there before his ultimate acquittal, Patrick a longer period before his pardon. More than once during that time a man is taken from an adjacent cell and led through the grim door beyond which is death. The sight is enough in itself to unnerve a strong man. Think of its effect on one on whose memory is burned the day when he must walk that same path. The whole is a refinement of cruelty worthy of the middle ages. If condemned men were kept in a county jail until a short time before the execution they would not be deprived of the visits of relatives or counsel, they would be freed from the atmosphere of horror that must hang around the death chamber, their minds would be to some degree open to the consolation of religion, and the fear and hate which they take into the invisible world would be at least slightly lessened." It must be admitted that there is considerable force to the argument. Such measures as the one proposed have been adopted in some states. In Massachusetts, for example, a condemned man is not isolated until the day before that set for the execu-

tion. If it is asking too much in the name of humanity to abolish capital punishment, certainly the way to the chair or the gallows should not lead through the torture chamber, and we may well pause to consider whether there exists the necessity for reform in that regard.

**The Place of Execution.**

Another humane reform which is being urged, consistent with the retention of capital punishment, is that the sentence of death should be executed at some place other than the penitentiary. Warden Moyer of Sing Sing says: "Personally, I am for a separate institution for murderers awaiting execution. The effect of an execution on other prisoners is undeniably bad. You cannot keep it from them when a man has been put to death and it has a depressing effect which is felt through the institution." The condition of which Mr. Moyer speaks is familiar to every student of penology; that is, the morbid excitement that pervades the prison at the time of an execution, and the wave of depression, lasting often for days, which follows it. Many believe that the psychological effect on the entire community is just as real and just as evil, and when that belief possesses a majority capital punishment will disappear. But so far as the effect within prison walls is concerned any experienced warden or prison guard can vouch for its reality and its pernicious effect. The task of reformation is hard enough for both warden and convict without making it harder in this way.

## PROPERTY IN WILD ANIMAL ESCAPING FROM CAPTIVITY.

A captive fox, attempting to apply the doctrine of self-help to the accomplishment of his manumission, recently escaped from the restraint of his human owner and sought to revert to a state of nature in such an unpropitious neighborhood as the heart of the Cabaret Belt of America's densely populated and super-civilized metropolis. He was first sighted in front of the Hotel Astor, whence he fled down the middle of the Great White Way. He turned west at 42d street and was speeding up Eighth avenue in defiance of traffic laws, and altogether *absque animo revertendi,* when his pursuit of the call of the wild was ended by the act of a passing railroad brakeman and quondam fox hunter, who gave chase, caught the fugitive, and reduced him *manu forti* again to human dominion.

The incident serves to evoke a legal query of some academic nicety, but of considerable interest; namely, To whom did the recaptured fox belong, the brakeman-huntsman-captor or the former owner? The question may become practical. Suppose a captive lion or bear, of high pecuniary value, escapes from a traveling menagerie, and, rampant in the community, terrorizes the populace until some hardy citizen, at the risk of death or mayhem, corners the beast, pens him up, and reduces him to possession. Does the animal then become the property of the new captor, or does the circus company retain its ownership? The answer is not free from doubt, and an attempt at arriving at it necessitates a moment's rumination of legal history.

The common law of animals was grounded on a division of the earth's fauna into two classes, *ferœ naturœ,* i.e., wild animals, and *domitœ* or *mansuetœ naturœ,* i.e., tamed or domesticated animals. Regarding the latter class, it suffices to say that animals *domitœ naturœ* are and have always been recognized in English law as the subject of absolute personal property. The word "chattel" itself, from the Old French *catel,* "cattle," signifies as much. Our present concern is with the first class, animals *ferœ naturœ.*

In a general sense, civil jurisprudence from the times of the early Romans, has regarded all wild animal life within a realm as belonging to the sovereign. But as to individual ownership, both by the law of nature and by civil jurisprudence, wild animals in a state of nature are not the subject of ownership, can belong to nobody. The common law, however, recognized that animals *ferœ naturœ* could become the property of individuals by killing, by taming, or by capture and confinement. See 2 Bl. Com. 388. But it was a fixed and well-understood principle, that the property thus acquired in wild animals was only qualified, or defeasible, in that it was subject to be divested by the escape of the animal and its reversion to a state of nature, whereby all property in it was extinguished. One exception to this rule was that if the animal, when it escaped, had the *animum revertendi,* the property in it was not lost. In the words of Blackstone, animals *ferœ naturœ* "are no longer the property of a man, than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi,* which is only to be known by their usual custom of returning." And the same principle was stated in Lord Coke's report of the Case of Swans, 7 Co. Rep. 15b, 77 Eng. Reprint 435, as follows: "Property qualified and possessory a man may have in those [animals] which are *ferœ naturœ;* and to such property a man may attain by two ways, by industry, or *ratione impotentiæ et loci;* by industry, as by taking them, or by making them tame, *mansueta,* i.e., *manui assueta,* or *domestica,* i.e., *domui assueta;* but in those which are *ferœ naturœ,* and by industry are made tame, a man hath but a qualified property in them, *scil.,* so long as they remain tame, for if they do attain to their natural liberty, and have not *animum revertendi,* the property is lost." American cases stating these common-law rules are *Brinkerhoff* v. *Starkins,* 11 Barb. (N. Y.) 248; *James* v. *Wood,* 82 Me. 173, 19 Atl. 160, and other cases cited herein.

It is, therefore, clear that the common law answered in the affirmative the question, Does the owner of an animal *ferœ naturœ* lose his property when the animal escapes *non animo revertendi* and reverts to wildness? And it seems clear that the same answer is the law now, unless we can support a thesis for a change of the law by virtue of a ceasing of its reason.

A comparatively recent authority for the common-law rule, and an interesting case, is *Mullett* v. *Bradley,* 24 Misc. 695, 53 N. Y. S. 781. A sea lion, captured in the Pacific Ocean, was transported across the continent for exhibition purposes, escaped from its owner on Long Island, and was captured by a fisherman in the Atlantic. In an action for damages for the alleged conversion of the animal the court simply applied the common law as stated by Blackstone, saying, after quoting his statement of the law: "But it is quite unnecessary to multiply citations of authority for a proposition of law so well settled and familiar as this. It is quite apparent that the case under considera-

tion comes directly within it. The sea lion in question was *ferœ naturæ,* and the right of property which the plaintiff had undoubtedly acquired in it was, so to speak, defeasible and always contingent upon his maintaining his right by actual control when opposed by a disposition on its part to escape and resume its former freedom of action. The evidence not only fails to show that there was any *animus revertendi* on its part, but the inference from the facts proven is quite the contrary. Blackstone states, as we have seen, that an intention to return, where such animals depart from the immediate control of the owner, 'is only to be known by their usual custom of returning.' Of course the evidence here shows that there was no such custom, but that, at the earliest opportunity, the animal broke away from restraint, and had traveled over seventy miles from its place of confinement when it was captured, some two weeks afterwards. The necessary inference from the history of its movements is that there was decidedly no intention on its part of returning to its place of captivity, or of again submitting itself to the domination of the plaintiff."

It was argued, not unreasonably, for the plaintiff in the foregoing case, that by a return to natural liberty the common-law rule did not mean simply an escape from the master's restraint, but that in order for property in a captive wild animal to be lost, its escape must be into such a locality as would be a natural habitat for that species in a wild state. The court held, however, that the common-law rule was subject to no such qualification. It was said: "But it was contended on the part of the plaintiff that there can be no return of such an animal to its natural liberty until it has either reached its native place or, at least, a place where the conditions of existence are normal and suitable to its habits and physical requirements. In support of this claim evidence was given tending to show that sea lions of this character are not found on the Atlantic coast, but only on the Pacific, from the bay of San Francisco to St. Nicholas island, or from latitude 30° north to 36° north, and that, for some reasons not fully explained, the conditions along the Atlantic coast are not favorable to their existence here in a wild state. However that may be, I do not think that the rule is subject to any such sweeping qualification. The natural liberty to which the law refers means that which the animal formerly enjoyed, namely, to provide for itself, in the broadest sense in which the phrase may be used. In short, it may be said to have regained its natural liberty when, by its own volition, it has escaped from all artificial restraint and is free to follow the bent of its natural inclination. Such, it seems to us, was the case here."

Although distinctly discredited by the court, there would seem to be logic in the contention of the plaintiff in *Mullett* v. *Bradley,* supra. The reason that at common law property in a wild animal was deemed to have been lost by its escape and reversion to natural liberty was that the animal thereby became again incorporated in the body of the wild animal life, and that wild animal life was without the realm of property. The idea was not so much that the individual ownership as against other individuals was lost, but that all capacity for human ownership was lost. The animal was no longer the subject of property. The rule grew up in a primitive time, when civilization had only taken the initial steps of encroachment on nature's wildness, when the vicinage of every baronial castle and of every villein hut was almost primeval forest, the natural habitat of all the variety of wild fauna which the geographical locality afforded. The state of nature was within instant reach of any escaping wild animal. But it is a far cry from that historical and social background to the situation of the fox escaping on Broadway. That fox was temporarily running wild, no doubt. He had suffered a sudden return to "his former ferocious state" as the old books phrase it, but he was not in a state of nature. Such a state is not to be found on Manhattan. He might find human foxes more crafty and cunning than he, but they would furnish him little companionship; he might seek association with the bulls and bears of Wall street, but in competition with those rapacious beasts of prey he would have little chance of sustaining himself on the lambs of the vicinity. The only of his wild fellows which he might find would be in the zoo, and to mingle with them he would be obliged to enter the bars and confines of human dominion again. Why might not the property right of his owner follow him through a temporary liberty in surroundings in which liberty could not possibly long endure? May it not be questioned whether the old rule is strictly applicable to our highly civilized life, at least in urban and developed rural communities in which there is to be found no such state of nature as would provide a habitat for wild animals in their wild state. Of course the fox on the streets of New York is an extreme case, but the same considerations apply equally to animals escaping from a circus in a village community remote from wilds and forests.

There is a well-defined tendency in modern cases to extend the principle of ownership in animals *ferœ naturæ,* and while the common-law rule of loss of ownership by escape does not seem to be altogether overturned, there is a perceptible drift away from it. To the extent of its application to animals of a wild species which have been captured and tamed, it appears from several cases that the rule has been abandoned. Thus it has been held that tamed wild geese are not lost as the property of the owner by their straying away and being captured by another. See *Amory* v. *Flyn,* 10 Johns. 102, wherein it appeared that certain geese of the wild kind, which had, however, been tamed, strayed away and were caught by two men who pledged them to the defendant for liquor furnished them by him. The defendant refused to deliver them up to their owner, the plaintiff, unless he would pay for the liquor for which the geese were pledged. The plaintiff sued in trover and was granted recovery, without the payment of the pledge. In that case the geese were treated substantially as domestic animals.

A similar case is *Manning* v. *Mitcherson,* 69 Ga. 447, 47 Am. Rep. 764, wherein the court held that the owner of a tamed canary bird had such property in it, even after its escape and flight, as would entitle him to recover it by possessory warrant from one who recaptured it. It appeared in that case that the plaintiff had a tamed canary called "Sweet," which knew its name and would answer to call, and that it escaped one day and came into the possession of the defendant. The court, holding that the plaintiff could recover it, said: "Under this evidence, there does not seem to be any question of sufficient possession and dominion over this bird to create a property right in the plaintiff. To say that if one has a canary bird, mocking bird, parrot, or any other bird so kept, and it should

accidentally escape from its cage to the street or to a neighboring house, that the first person who caught it would be its owner, is wholly at variance with our views of right and justice. To hold that the traveling organist with his attendant monkey, if it should slip its collar, and go at will out of his immediate possession and control, and be captured by another person, that he would be the true owner and the organist lose all claim to it, is hardly to be expected; or that the wild animals of a menagerie, should they escape from their owner's immediate possession, would belong to the first person who should subject them to his dominion."

A tamed buffalo bull calf has been held to be the subject of such property as would sustain an action of trespass for the killing of it while it had temporarily escaped from its owner's enclosure and was trespassing on the lands of the defendant, and it was held that the action was maintainable without any proof of *animus revertendi*. See *Ulery* v. *Jones*, 81 Ill. 403, wherein the court said: "Appellee insists, this animal, being *ferœ naturœ*, was trespassing on his premises, and he had a right to kill him. He contends, the animal was not in such a condition of subjection to its owner as to give him a property in the animal. He cites that passage, in 2 Blackstone's Com. 389, 390, with which all are familiar, and lays great stress upon the fact that it was not proved the animal, when it had strayed away from the owner's enclosure, was accustomed to return to it, and, therefore, being found wandering at large, he became game for the hunter, and if actually trespassing on a neighbor's enclosure, such neighbor would have the right to shoot him down. The proof on this point is, that once, certainly, the animal, after an absence of some time, returned voluntarily to his owner, but usually, when neighbors made their complaints of his conduct, appellant would send a man and drive him home. The animal was scarcely old enough to have acquired the habit of coming home, nor do our domestic animals of that kind, at certain seasons of the year, make regular returns to their homes, yet they fail not, even after long absences, to return to their master's crib. An ordinary domestic bull, at the early age of two years, would, quite likely, lack the observance of the custom insisted upon as an unerring evidence of domesticity. This animal may be said to have been, at all times, in the keeping and actual possession of his owner, for he was so tame and gentle there was no trouble in driving him home to his accustomed pasture—as much in his actual possession and keeping as a domestic breachy animal can be who is absent from his home for weeks or months. Who can say, when this young animal should have matured, he would not have returned regularly with the herd to their proper home? But, whether or not, it cannot be denied, under the evidence, the animal was so tame and gentle as to render it no longer of a wild nature. It was completely tamed, and, therefore, a subject of property."

While, therefore, the cases have gone so far only as to hold that the old law as to loss of property in wild animals by escape does not now apply to animals *ferœ naturœ* which have been tamed, it seems that the same reasoning on which that holding is founded would apply to the case of the escape of a wild captive animal in a locality in which he cannot exist in a state of wildness. The court in *Manning* v. *Mitcherson*, supra, specifically intimated that the supposed case of the escape of a valuable wild animal from a menagerie would be a case to which the former strict rule would be inapplicable, and a convincing argument could well be made in favor of the continuation of the property right of the owner of the Broadway fox after its escape. The wild geese in *Amory* v. *Flyn*, and the canary in *Manning* v. *Mitcherson*, supra, indeed could much more easily revert to an absolute state of nature than could the escaping fox or bear. Until a more direct ruling is made, however, the law in this regard must remain somewhat *in nubibus*.

S. S. ALDERMAN.

## CRIMINAL JURISDICTION OF STATE COURT OVER MILITARY FORCES.

THE stationing of troops to guard various places of industrial or military importance has already resulted in the death of several civilians under circumstances which would have constituted a crime against the state laws had it not been for the military exigency. In some communities which do not realize the legal and moral duties devolving on the citizens of a nation at war there may be an attempt to assert a state jurisdiction in such cases. During and after the war of 1812 an act of Congress provided for the removal to a federal court of all actions and prosecutions for acts connected with the war. (See *Wetherbee* v. *Johnson*, 14 Mass. 412.) A similar act was passed in 1863, and amended in 1866, with reference to the acts of civil and military officers in the prosecution of the Civil War. No such act is now in force, but as far as concerns members of the armed service of the United States or of the militia when called into the federal service, no statute is necessary to divest the state courts of jurisdiction. Even in time of peace, an act done by an officer of the United States in the execution of his duty as such is not an offense against state laws, and the federal courts will summarily discharge him from any attempted state restraint. (*Tennessee* v. *Davis*, 100 U. S. 257; In re Neagle, 135 U. S. 1.) If in time of peace they permit the state court to act, it is done only as an exercise of discretion, and as a matter of comity. *U. S.* v. *Lewis*, 200 U. S. 1. Thus in the case of In re Fair, 100 Fed. 149, a private soldier held for murder in a state court for shooting in pursuance of an order of a sergeant was discharged on habeas corpus. In Ex parte Schlaffer, 154 Fed. 921, such a discharge was granted though the act for which the soldier was held was committed while he was off duty and was in no way connected with his military duty. In the case of In re Wulzen, 235 Fed. 362, Ann. Cas. 1917A 279, a member of the militia mobilized for service in Mexico was discharged from a state arrest. The reason which lies behind the rule is, of course, that during the time the federal soldier or officer is under arrest he is withdrawn from the performance of his duty to the nation. *Tennessee* v. *Davis*, supra; In re Waite, 81 Fed. 359; In re Wulzen, supra. That reason was well illustrated in the Neagle case, wherein it appeared that Marshal Neagle was arrested by a local constable, leaving Mr. Justice Field unguarded at a time when the wife and accomplice of his would be assassin was at large brandishing a weapon and threatening vengeance. "The government of the United States may by means of physical force execute on every foot of American soil the powers and functions that belong

to it." Mr. Justice Bradley in Ex parte Siebold, 100 U. S. 395.

"The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. It can act only through its officers and agents, and they must act within the states. If when thus acting, and within the scope of their authority, those officers can be arrested, brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal government authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the state court,—the operations of the general government may at any time be arrested at the will of one of its members. . . . We do not think such an element of weakness is to be found in the constitution." Mr. Justice Strong in *Tennessee* v. *Davis,* supra.

In time of war the local commanding officer is not bound to permit the arrest of an enlisted man by any civil authority, state or federal. Rev. St. § 1342, 1 Fed. St. Ann. (2d ed.) 458. If a military commander refuses in time of war to obey an order of court no effort will be made to enforce it. Ex p. Merryman, Taney 246, 17 Fed. Cas. No. 9487; Ex p. Vallandigham, 27 Fed. Cas. No. 16,816; In re Kemp, 16 Wis. 359. It would seem clear, therefore, that during the continuance of the war any state tribunal which seeks in any way to take cognizance of an act of a member of the armed forces is inviting a peremptory rebuff.

W. A. S.

## THE BINDING FORCE OF INTERNATIONAL LAW

(*Continued from April* LAW NOTES.)

### III.

What, then, is International Law? Is it simply a code of moral rules, or diplomacy, or international courtesy? It cannot be a code of moral rules, for Ethics deals with the relations between individuals as well as between States, and should be the same for both. Besides, it deals with the relations between States from a point of view different from that of morality. Diplomacy has a great deal to do both with the making of new rules of International Law and also with its interpretation. But diplomacy is not International Law. Nor is international courtesy, which proceeds from the politeness and goodwill which States sometimes show towards each other. It is none of these. So, in order to attempt to place the matter on some foundation, let us examine the condition of the community of States. As has been pointed out already, States are still only somewhat loosely bound together, though they have many interests in common. And they are extremely suspicious and jealous of each other. What would be thought of a country where men went about armed to the teeth and ready to attack each other on the slightest provocation? And yet that is just the manner in which our highly civilized nations live together. In fact, the condition of the community of States resembles that of the early stages of society. The community of States is at the present time simply in the initial stages of its evolution, and has all the marks that accompanied early communities of men. And International Law bears the same relation to the community of States as their rules and customs bore to early communities, when society was not so well organized, and the protection given by the community was not so great as in modern times. Society has passed through a course of development in order to reach its present condition, and in its very early stages the members of communities were as loosely held together as States are to-day. There were undoubtedly rules for the conduct of individuals towards each other, but such rules or "customs" were not acknowledged and enforced by the power of the community, but were simply approved by public opinion. In fact, there were either no means of enforcing them or only very inadequate means of doing so. These rules were primitive substitutes for law; they were, perhaps, law in the making, or the source from which law developed. But they were not law—just as the spring from which a river has its origin cannot itself be called a river. The analogy of the rules and custom of early Society to International Law is complete. International Law is composed of rules of conduct for the guidance of a community which is still only loosely bound together, and in an early stage of its development, just as the rules of early society were for the guidance of a society whose members were also only loosely held together. In both cases public opinion is the only safeguard, for in neither community are the rules enforced by the community as a whole. Self-help is the order of the day, and each member depends for justice on his or its own strength. The International Law is law in the making—bearing the same relation to the community of States as the rules and customs of early society bore to early society itself.

In order to make International Law really Law, two innovations are necessary: (1) It must be made compulsory for States to settle disputes by arbitration; (2) Some authority must be established which can in the last resort compel States to go to arbitration and to abide by the decision when given. This is the problem of the future, although international negotiations have for many years past been much occupied with it. This war, with all its misery and bloodshed, will have been fought in vain if at its conclusion the nations of the world are left free as of old to wage war with each other upon the flimsiest of excuses. Something must be done to prevent a repetition of what took place in August, 1914, when the machinations of one State caused a world-wide disaster, unless we wish States to go on living in an atmosphere of mutual jealousy and fear, and spending on armaments vast sums of money that would be much better employed in the alleviation of distress. Every European country has enough problems to deal with in respect of her poorer classes without having to lavish money (which most can ill afford) on the preparation of weapons with which to murder fellow-beings. It is true that a strong attitude will have to be adopted. But there are many men able and willing to take it. In any case International Law will not stand still. As States are drawn more and more together it will go on developing until it becomes worthy of its name. Its progress will, in the ordinary course of events, be slow. But the conclusion of this war will provide an opportunity that may not recur for generations. And if it is taken a tremendous impetus can be given to the growth of International Law into real law. If the future peace of the world is to be one of the first considerations of statesmen, besides partitioning Europe in accordance with the principle of nationality, they must aim at establishing International Law on a secure footing. To many people this seems an Utopian dream. They are loud in their exclamations about the evil in human nature and the virtues of war, though their love of the latter must certainly be damped by the experiences of the present struggle. They say that it will be impossible to get States to submit to a common executive of any character—that the nations of the world will not tolerate such a thing. But

it is these croakers who are the only real obstacle to such reform. The education of public opinion is needed. Some months ago people ridiculed the proposals of Mr. Roosevelt and others for the establishment of a kind of International Police, or of concerted action by the different States. They pooh-poohed them as idealistic—"such stuff as dreams are made of." But let us not forget that a generation ago people laughed in a similar fashion at the idea of aeroplanes and submarines. To-day these are rather grim realities. The impossibility of the past is the commonplace of the present or the future—else the world would have no progress. But these reformers are not simply talking in the air. They have a foundation as well as a purpose for their schemes. For the Society of Nations, even as it is constituted to-day, has in it the germs not only of a common tribunal for the settlement of international differences, but also of an international Legislature and of an international system of administration. It is not essential to the existence of law that there should be a Legislature or law-making authority. That is a comparatively modern innovation of States. But even so, the Hague Peace Conference which has met twice already, in 1899 and 1907—and probably but for this war would already have met for the third time—is in some degree an international Legislature. "The States, at the instance of one or several of them, meet together, discuss and agree upon certain rules of International Law," for instance, Maritime Law. Such rules are, however, only considered binding on such Powers as may adopt them by assenting to them and afterwards ratifying such assent. But even so they form a code which other nations can follow, and which, owing to the imitative tendency in human nature, they do follow. Thus Italy, though it had not ratified the Declaration of London concerning the Laws of Naval Warfare (1909), declared its intention of adhering to it, and did adhere to it, in its late war with Turkey. And similarly, Great Britain, though it also has not ratified the Declaration of London, has adhered to most of it. The next step in the history of the Hague Peace Conferences will probably be that they will meet automatically within certain periods of time, without having to wait to be summoned by one or more of the States.

To turn to a more essential matter, there must be some authority to decide disputes between States, though it may be the community itself, or some body specially delegated for that purpose. In the Permanent Court of Arbitration established by the first Hague Peace Conference in 1899, the community of States already has the beginnings of such a specially delegated body. It is true that at present this Court is competent to deal only with disputes voluntarily submitted to it. But the very existence of such a court is a tremendous step forward in the evolution of the Society of Nations and of International Law as real law. And it is likely that the jurisdiction (and perhaps similar courts) will one day become compulsory, even, possibly, in the case of matters which affect the honor and status of a State. For the second Hague Peace Conference in its Final Act was "unanimous in admitting the principle of compulsory arbitration," and "in declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction." Moreover, in one case compulsory arbitration has been agreed on, viz., with regard to the Recovery of Contract Debts—Convention II. of the Second Hague Conference. Article I. of this Convention reads as follows: "The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, renders the settlement of the 'Compromis' impossible, or, after the arbitration, fails to submit to the award." With regard to the establishing of a common executive, this may either take the form of concerted action by all the States combined, or else a special authority or executive may be created. This would not be the first example of international administration, for, as shown above, there are already international organizations in existence with reference to various modern activities, such as the Post Office Union, Commissions with regard to Commerce, and so on. But the powers and object of the executive under discussion could be limited simply to preventing States from going to war, and to compelling them to arbitrate on disputed points and to abide by the result. It need have no other powers or aim assigned to it. Whether such a central authority were composed of the States acting in concert or were a specially delegated body, it would help to get rid of that canker of international life and dealings, secret diplomacy, which has proved such a failure to the peace of nations. We must have no more secret treaties and negotiations. Everything must be above-board and open, if not to the people, at least to a considerable number of the people's representatives—Members of Parliament.

It may be that even with compulsory arbitration in vogue and a central authority in existence, there would still be war. But a State would be very reluctant to fight if it knew that it would have the rest of the world in arms against it. And the central executive would not need to wage war, even as a last resort, against a recalcitrant State. For war would not be the only means of punishment. There would be other means, such as the suspension of diplomatic relations between the offending State and the other States, or "the refusal to allow its citizens to sue in the courts of other States," and so on. Of course, circumstances might arise in which war with a powerful offending State would be inevitable, for such a State might think itself strong enough to attack all the other States. But if, on account of the imperfection of human nature, war would not altogether disappear, it would certainly be of very rare occurrence, and would only be resorted to as the very last eventuality. But with the education of public opinion, the spread of democratic forms of government, and the partition of territory in accordance with the principle of nationality, the world would more readily recognize the supremacy of law even in international affairs.—P. M. CLOUTS, in *South African Law Journal.*

## CONTRACTS AND WAR PRICES

UNFORTUNATELY in the times previous to the commencement of the war the English people considered war to be such a remote contingency as not to be worth taking into consideration in transacting the ordinary business of life. These are in effect the words of Mr. Justice Neville, when his Lordship was recently sitting in the Court of Appeal. The case before the court raised an interesting question as to the effect of the great rise of the price of a certain commodity through the conditions resulting from the war on a contract to supply that commodity. The effect of the war on contracts has often formed the subject-matter of articles in these columns, and from time to time it has been pointed out that impossibility of performance must be distinguished from hardship in fulfilling the contract. In the case to which we have alluded, *Wilson & Co., Ltd.* v. *Tennants (Lancashire), Ltd.*, (114 L. T. Rep. 878; (1917) 1 K. B. 208), the parties had to some extent

provided against the contingency of war and the results flowing therefrom. The question before the court was whether the supplying of the commodity in question had been prevented or hindered in consequence of the war within the meaning of the contract.

Cases of this kind—cases on the law of contract—are, as a rule, deprived of their value as authorities in law by being narrowed down to the peculiar and particular wording of the contract. In one sense the recent case mentioned above is no exception to this. But the words actually used in the contract in question were words which might very readily occur in other contracts, and are words moreover, which might readily be relied upon by parties to *post*-war contracts. In this respect the recent case may well serve as a warning to intending contractors to make their meaning very clear, if they are to avoid the risk of being involved in heavy loss. The contract in the recent case was not a *post*-war, but a *pre*-war contract. The learned members of the Court of Appeal did not agree on the question of construction. The majority of the court —the Master of the Rolls and Lord Justice Pickford—held that commercial unprofitableness was not what was intended by the words in question, and that although the effect of the war was to involve the seller in a very bad bargain, he was bound by his contract to carry out delivery or to pay damages. Mr. Justice Neville dissented.

Before we consider the circumstances of the recent case in more detail, let us remind the reader of the proposition that has often been laid down, but much more often not applied, that if a man contracts unconditionally to do a thing he is bound to fulfil that engagement come what may, or pay damages to the other party for his failure to fulfil it. This principle is well exemplified by the case of *Hills* v. *Sughrue* (1846, 15 M. & W. 253), where the court held that a shipowner, who had contracted to sail to a particular guano island and there take a cargo of guano, could not set up the fact that when the ship arrived at the island in question no guano was found, as an answer to the plaintiff's claim for breach of contract. Again, In Re Arthur; *Arthur* v. *Wynne* (43 L. T. Rep. 46; 14 Ch. Div. 603), a man covenanted in a marriage settlement to insure his life. He was, according to the covenant, to insure on or before a specified day. When the specified day arrived his life proved to be uninsurable, and shortly afterwards he died. The trustees of the marriage settlement claimed against his estate on the footing of breach of contract, and Sir George Jessel, then Master of the Rolls, held that they were entitled to recover.

The courts have always been very ready to find some reason for not applying the rule we have just mentioned. If some unforeseen event occurs after the contract is entered into, but before it is performed, the courts have been diligent in discovering some ground for distinguishing the promise from an absolute and unconditional one. Thus Sir James Hannen in *Bailey* v. *De Crespigny* (19 L. T. Rep. 681; L. Rep. 4 Q. B. 185) said: "Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." Again, Lord Blackburn, when Mr. Justice Blackburn, in the case of *Taylor* v. *Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826), after referring to the rule that the contractor must either perform his contract or pay damages, laid it down that that rule was only applicable when the contract was positive and absolute, and not subject to any condition either express or implied. "There are authorities," said his Lordship, "which we think establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done; there in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without the default of the contractor."

The war has resulted in many cases in *pre*-war contracts being discharged on this principle of implied condition that some particular thing or state of circumstances should continue to exist, and which particular thing or state of circumstances has ceased to exist by reason of the war. Sheer impossibility of performance because of the war has also discharged a great number of contracts —a familiar and good example is afforded by the case where it becomes illegal to deal with one of the parties because of the law against trading with the enemy. But all these cases must be distinguished from the case where the consequences of the war render the contract not actually physically or legally impossible, but merely commercially impossible.

Where a contract is reduced into writing, the terms of the contract are, of course, to be discovered from the words used, construed in the light of the circumstances subsisting at the time when the contract was entered into. In *Blythe & Co.* v. *Richards, Turpin & Co.* (114 L. T. Rep. 753) a contract was entered into, after the commencement of the war, for the sale of iron pyrites produced at certain mines in Portugal, which the sellers were to deliver at Manchester. A specified number of tons each year and for three years were to be so delivered. The contract contained a clause to the effect that if war or any other cause over which the sellers had no control should prevent them from shipping or exporting ore from a river which the contract specified, the obligation to ship or deliver under the contract should be partially or entirely suspended during such impediment and for a reasonable time afterwards to allow the sellers time to recommence shipments. Owing to the rise of freights it became impossible for the sellers to complete the contract except at a loss, and they claimed to be at liberty to terminate the contract accordingly. Mr. Justice Scrutton took the view that prevention in this contract meant a physical or legal prevention, and not economic unprofitableness. "You are not prevented," said his Lordship, "from buying a thing if you think its cost higher than you can afford, or that it is not worth the price. You are prevented from buying a thing by a given cause if, owing to that cause, there are none to be had."

The decision of the majority of the Court of Appeal in the recent case of *Wilson & Co., Ltd.* v. *Tennants (Lancashire) Ltd.*, sup., to which we have already alluded, is very much to the same effect, but the actual words of the contract in that case were somewhat different and the circumstances perhaps somewhat more complex. In this case, as we have already intimated, the contract was a *pre*-war contract current and unfulfilled when the war broke out. There the defendants entered into a contract to supply the plaintiffs with a particular commodity over the year 1914 at a fixed price. At the time of the outbreak of war the main sources of supply in this country of this commodity was the product of a concern in this country, and the product of certain German concerns. When war broke out, the latter supply of course ceased, and the concern in this country was apparently in the position of monopolists. In consequence of all this the price of the commodity rose very considerably. The contract contained a provision to the effect that deliveries might be suspended pending any contingencies beyond the control of the sellers or buyers (such

as fire, accidents, war, or the like), causing a short supply of labor, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article. The defendants claimed to be at liberty to suspend delivery under this provision in the circumstances above mentioned.

The reader will observe that the words "preventing" and "hindering" were used in the contract in this case. Lord Justice Pickford took the view that the defendants had not shown that they could not obtain sufficient to supply the plaintiffs, but only that the carrying out of the contract would involve the defendants in loss. As to the particular words of the contract, his Lordship was of opinion that the word "prevention" in a clause of the kind could not cover economic unprofitableness, but was confined to the meaning of a physical or legal prevention. As to the word "hindering," the learned Lord Justice considered that in such a clause it referred to an interference with manufacture or delivery from the same causes as "prevention," but to an interference of a less degree. "And thus," said his Lordship, "economic unprofitableness does not hinder either manufacture or delivery within the meaning of this condition." The Master of the Rolls agreed with this judgment.

Mr. Justice Neville, however, took the view that the contract entitled the defendants as sellers to suspend delivery pending the war, which caused a short supply of the article and a substantial rise in price. "We say," observed his Lordship in the course of his judgment, "we are prevented from getting things we want by their cost, prevented from accepting an invitation by a previous invitation, prevented from doing certain acts by self-respect. We speak of being hindered in our work by noise, of a man's career being hindered by his appearance or manners or some personal quality. In fact, the idea of physical obstruction rendering a thing impossible seldom enters into our meaning when we say we are prevented or hindered."

These two recent cases show how careful parties ought to be in entering into contracts nowadays when they desire to protect themselves against the unforeseen circumstances arising out of the state of war. The average person might very well suppose that he was protected from the consequences of a very untoward rise in prices making his contract a loss if he stipulated that the contract was to be suspended if he was hindered in carrying it out through the circumstances attributable to the war. In future, however, he must be careful to stipulate that a rise beyond a certain figure is to give him grounds for suspending or terminating the contract. This would appear to be his best course. But many other eventualities must be considered, such as shortness of labor and so forth. In truth, it would seem that there is a great want for a common form clause especially directed to relieving the parties from untoward circumstances connected with the war. But the difficulty in drawing such a clause is immense, for contracts vary in every case.—*Law Times.*

## Cases of Interest

Validity of Contract Between Lawyers for Procurement of Damage Claims.—The case of Ellis *v.* Frawley, (Wis.) 161 N. W. 364, brought to the attention of the Wisconsin Supreme Court the validity of a contract between lawyers by which one of them was to solicit damage claims from flood sufferers, the claims to be prosecuted by the other on a contingent fee. The former performed his part of the contract and sought an accounting, and the lower court gave judgment in his favor, which was, however, reversed by the Supreme Court on the ground that the contract was contrary to public policy. The court by Winslow, C. J., said: "The mere intermeddler, the officious stirrer up of litigation in which he has no interest save the possibility of a commission or a fee, has been condemned by courts and legislators since the earliest times. This is so because the practice of the law is not a trade but a ministry. Chief Justice Ryan well said in his eloquent address before the graduating law class of the University of Wisconsin for 1873: 'The pursuit of the legal profession for the mere wages of life is a mistake alike of the means and the end. It is a total failure of appreciation of the character of the profession. This is the true ambition of a lawyer. To obey God in the service of society; to fulfill His law in the order of society; to promote His order in the subordination of society to its own law adopted under His authority; to minister to His justice, by the nearest approach to it, under the municipal law, which human intelligence and conscience can accomplish. To serve man, by diligent study and true counsel of the municipal law; to aid in solving the questions and guiding the business of society, according to the law; to fulfill his allotted part in protecting society and its members against wrong, in enforcing all rights and redressing all wrongs; and to answer before God and man, according to the scope of his office and duty, for the true and just administration of the municipal law.' The ideal here expressed is high; it is by no means always lived up to, but it is none the less the ideal towards which the profession should ever strive. It is because the ideal is frequently lost sight of, because many lawyers practice their profession as if it were a mere business like the buying and selling of groceries, that the profession falls into disrepute. The great Chief Justice died before the evolution of the personal injury action and that degraded form of lawyer commonly known as the 'ambulance chaser'; what he would have said of them can better be imagined than described. . . . Attorneys are entitled to good pay, for their work is hard; but they are not entitled to fly the black flag of piracy. Such contracts as are here in question tend to make the lawyer forget his high duty as a minister of Justice and to convert him into a mere grubber for money in the muck-heaps of the world. They also tend to make the name of lawyer a proverb and a byword among laymen."

Janitor Breaking up Coal for Furnace in Railroad's General Office as Engaged in Interstate Commerce.—A janitor who worked in the general office of a railroad engaged principally in interstate commerce and who was injured while breaking up coal for the furnace was not, it was held in Great Northern R. Co. *v.* King, (Wis.) 161 N. W. 371, entitled to sue for damages under the provisions of the federal Employer's Liability Act. The court said: "Many cases, state and federal, are cited to us upon the question whether King [the janitor] was engaged in interstate commerce at the time of his accident. To review them would be of no use, and would but add confusion to a subject already sufficiently confused. The Supreme Court of the United States is, of course, the final authority on the subject, and the two most recent cases on the subject which are cited to us are Shanks *v.* D., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, and C. B. & Q. Co. *v.* Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. ed. 941. In the first case named the injured employee was injured while altering the location of an overhead countershaft in the repair shop of the company where locomotives of the company engaged in both interstate and intrastate transportation were repaired. In the second case named the employee was injured in removing coal from storage tracks to coal chutes where it was to be put into locomotives for use in hauling interstate trains. In both

cases the court said that the employee at the time of the injury must be 'employed in interstate commerce,' and that the true test of such employment is, 'Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?' In each case it was held that the employee was not so engaged. Applying the test laid down in those cases to the present case, it seems quite certain to us that King does not answer its calls. It is true that the business of the Great Northern Railway Company is almost entirely interstate business, and that its state business is absolutely trifling in comparison; nevertheless it transacts both interstate and intrastate business, and where this is the case we see no logical line that can be drawn based on the relative amount of the interstate business which is done."

BASEBALL BAT AS "BLUDGEON."—Under a New York statute providing that "a person who attempts to use against another, or who carries, or possesses, any instrument or weapon of the kind commonly known as . . . bludgeon . . . or any other dangerous or deadly instrument or weapon, is guilty of a misdemeanor," a person having concealed about his person what had evidently at one time been part of a boy's baseball bat, the upper part being broken off, was convicted of carrying a dangerous weapon, viz., a bludgeon, and the conviction was sustained by the New York Court of Appeals. The case is reported in People *vs.* McPherson, 220 N. Y. 123, wherein McLaughlin, J., speaking for the court said: "I have been unable to find any judicial determination as to what a bludgeon is. It is defined in the Century Dictionary as 'a heavy stick, particularly with one end loaded, or thicker and heavier than the other, used as an offensive weapon.' Webster defines it as 'a shortstick, with one end loaded or thicker and heavier than the other, used as an offensive weapon.' In Words and Phrases (Second Series) it is defined as a 'short club commonly loaded at one end or bigger at one end than the other, used as a weapon.' The object sought to be accomplished by the section of the Penal Code to which reference has been made is obvious. It is in the interest of public safety to prevent persons carrying the instruments enumerated, or using the same unlawfully against another. The evidence that this instrument was intended to be used unlawfully against another was sufficient, considering the way in which it was carried, to justify the jury in finding that the defendant had it in his possession for that purpose. The evidence was also sufficient to justify the jury in finding, considering the weight and shape of the instrument, that it is one with which serious bodily injury might easily be inflicted upon another, if used for that purpose. It was a bludgeon within the contemplation of the statute. This question was submitted to the jury in a charge as favorable to the defendant as he could ask, the court saying: 'Is it a bludgeon as you understand the term, a dangerous weapon? Take it in your hands, wield it as one might, and say whether, in your judgment, that could become a dangerous weapon, a bludgeon in fact, as charged here specifically by that special technical name.'"

INSTRUMENT IN FORM A DEED, BUT TO GO INTO EFFECT AT SIGNER'S DEATH, AS DEED OR WILL.—The question suggested by the catchline, though not one of first impression by any means, is well answered in Collier *v.* Carter, (Ga.) 91 S. E. 551, wherein it was held that where an instrument in the form of and attested as a deed contains a clause that it is "to go into effect at the" signer's death, and where there is no other indication as to the intention of the signer, and the paper is duly delivered, it will be construed to be a deed postponing possession. In the course of the opinion the court used the following language: "In Phillips *v.* Phillips, 186 Ala. 545, 65 So. 49, Ann. Cas. 1916D 994, the instrument construed contained the language, 'this deed is not to take effect until after my death,' and it was held to be a deed. Somerville, J., said: 'Courts have undertaken in innumerable cases to prescribe the general tests by which the character of an instrument in this regard is to be determined; but, while there seems to be a substantial uniformity of opinion as to the general principles to be applied, the cases themselves exhibit the utmost contrariety in the particular conclusions reached, even in the same jurisdictions.' In the opinion many cases are cited to sustain the rule, and in the notes appended thereto in Ann. Cas. 1916D 994, recent cases in many states are cited and discussed, dealing with the rules of law applicable to the construction of an instrument which has the form of a deed, but which is limited to take effect at the death of the grantor, either by its express terms or by the mode of delivery. The early cases on this question are collated in the notes to Hunt *v.* Hunt, 119 Ky. 39, 82 S. W. 998, 68 L. R. A. 180, 7 Ann. Cas. 788, and Ferris *v.* Neville, 127 Mich. 444, 86 N. W. 960, 54 L. R. A. 464, 89 Am. St. Rep. 480. From the great wealth of authorities thus gathered and analyzed the general agreement of courts may be stated. (1) An instrument which is in the form of a deed to take effect on the death of a maker where there are no other indicia to prove the intention of the grantor, and the instrument can be held valid, either as a deed or as a will, the court will construe the instrument so as to prevent its becoming inoperative. (2) Whether such an instrument is to be construed as a deed or a will depends upon the intention of the grantor as to the passing of a present irrevocable interest, or whether no interest should pass until after the death of the grantor, and whether the grantor until then should have the right to revoke the instrument. (3) The intention of the maker of the instrument is to be ascertained from the whole construed together. (4) Looking to extraneous facts, the delivery of the instrument is some evidence that the same shall operate as a deed, although its terms provide that possession is postponed until after the death of the maker."

AUTHORITY OF BOARD OF EDUCATION TO REQUIRE GRADUATES OF PAROCHIAL SCHOOLS TO BE EXAMINED FOR ADMISSION TO HIGH SCHOOL.—In Creyhon *v.* Board of Education, (Kan.) 163 Pac. 145, it was held that a rule of a municipal board of education, having authority to make rules for the government of the public schools of the municipality, was valid which required graduates of parochial schools seeking entrance to the public high school to stand an examination while permitting graduates of the eighth grade of public schools to enter without an examination. The court said: "The board has means for investigating and determining the evidential value of a certificate of graduation from a public school anywhere in Kansas, that are not available with respect to any school not under public management. The courses of study, the general methods pursued, the establishment of standards, are subject to legal regulation. How far in a particular instance they are conformed to may always be determined by investigation conducted as a matter of right. However efficient a private school may actually be, the board does not have, and cannot have, the same facilities for satisfying itself on the point. Any opportunity afforded it for investigating the question would depend upon courtesy and not upon law; would be a privilege and not a right. And while it might well avail itself of such an opportunity and treat the diploma of such a school as a substitute for an examination if in its judgment the information acquired justified that course, a court cannot control its action in that regard. Reported cases which are cited seem to have but little direct bearing upon the que-

tion just considered. For illustration, our attention is called to two decisions, seemingly to the effect that a rule is unreasonable which prescribes the branches a pupil in a public school shall study. School Dist. No. 18 Garvin Co. *v.* Thompson et al., 24 Okl. 1, 103 Pac. 578, 24 L. R. A. (N. S.) 221, 138 Am. St. Rep. 861; Trustees of Schools *v.* People, 87 Ill. 303, 29 Am. Rep. 55. It is doubtless competent for the Legislature to authorize those in the control of the public schools to regulate that matter, and whether it has done so would seem to be a question of statutory construction. In any event a solution of that problem would throw little light upon that now under discussion."

VALIDITY OF FEDERAL STATUTE PROHIBITING CAMPAIGN CONTRIBUTION.—Section 83 of the Penal Laws of the United States (see 1909 Supp. Fed. Stat. Annot. 427) provides that "it shall be unlawful for . . . any corporation whatever to make a money contribution in connection with any election at which . . . a Representative in Congress is to be voted for . . ." This statute is held valid in United States *v.* United States Brewers' Ass'n., 239 Fed. 163 on motions made to quash indictments against the United States Brewers' Association and others for conspiring to make money contributions in violation of the statute. Thomson, District Judge, said: "It may be said that there are three means of participation in the government so far as its representative nature is concerned, namely: by the exercise of the right of suffrage; by persuasion or coercion of the individual possessing that right; and by furnishing the means by which the individual may be persuaded or coerced. The time has not come and probably never will come, when the right of suffrage will be extended to the artificial beings known as corporations. To prevent undue influence by the second and third means, nearly every state has enacted laws commonly called 'Corrupt Practices Acts,' prescribing limitations on the exercise of influence over the voter at elections. That the government has equal concern in preserving the freedom of the voter and the purity of the ballot when its Representatives in Congress are to be voted for needs only the statement to be conceded. By various acts Congress has undertaken to control the agencies by which political activities in campaigns may be carried on, the amount of money which a candidate may spend, the purposes for which it may be expended, and the manner of accounting for all such expenditures. Section 83 in question is in line with this wise and beneficent legislation by undertaking to place a prohibition against political activities by those artificial beings who are merely the creatures of the law. That Congress may control those corporations which the federal government has created goes for the saying. And when we reflect that Congress is here dealing with elections at which Representatives in Congress are being voted for; that an election is intended to be the free and untrammeled choice of the electors; that any interference with the right of the elector to make up his mind how he will vote is as much an interference with his right to vote as if prevented from depositing his ballot; that the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election; that any law the purpose of which is to enable a free and intelligent choice, and an untrammeled expression of that choice in the ballot box, is a regulation of the manner of holding the election—the power of Congress to prohibit corporations of the state from making money contributions in connection with any such election appears to follow as a natural and necessary consequence."

ROBBERY BY "HOLDUP" AS INCLUDING TAKING MONEY FROM VICTIM IN ELEVATOR WITHOUT HIS KNOWLEDGE.—What constitutes robbery by "holdup" is illustrated by the case of Duluth St. R. Co. *v.* Fidelity & Deposit Co., (Minn.) 161 N. W. 595. It appeared therein that the defendant insured the plaintiff against direct loss by robbery by force and violence commonly known as highway robbery or holdup. Plaintiff's treasurer, with a large amount of money in an inside pocket of a coat buttoned up, encountered three thieves in an elevator. One crowded him against the others and thus distracted his attention while the other two filched his money without his realizing it at the time. It was held that this constituted a robbery by "holdup." The court through Hollam, J., said: "Defendant's counsel contends that this is not a case of holdup. The term 'holdup,' he contends, signifies 'a crime of open violence characterized by desperate criminal force'; in other words, it means only desperately violent robbery. We cannot adopt this definition. The term originated, as have some other expressive words, in American slang. Webster defines it as 'an assault . . . for the purpose of robbery, originally on traveling parties in the Western United States.' Webster, New Int. Dict. (ed. 1913) p. 1025. Strictly speaking, it signifies the assault rather than the robbery. It is elsewhere defined, 'to stop for the purpose of robbing.' Standard Dict. 1913, p. 1169. The term doubtless arose from the accompanying demand to hold up hands (Standard Dict. supra), just as the words 'stick up,' a term originating among the bushrangers of Australia, arose from detention accompanied by the appropriate 'sticking' of a gun. See Webster, 2044. This latter word has come to have a broader colloquial meaning and now means 'to rob in general.' See Webster New Int. Dict. (1913) 2044; Standard Dict. (1913) 2380. We think the term 'holdup' has acquired the same general meaning. The element of place or environment is gone from it. Robbery by holdup is used to signify any form of robbery by the use of force. We are not disposed to give to the word 'holdup' any narrower meaning. We cannot classify robbery by holdup as a specialized form of robbery to be ascertained by measuring the amount of force or violence used. The uses of the term have, no doubt, been somewhat vague. Yet defendant prepared this policy. Words of doubtful meaning must be construed most strongly against it. Meanings not made clear will not be inferred to defeat liability. . . . We think Mr. Reichert was the victim of a 'holdup' as that term is now understood. We think that if three knaves set out to get a person's money from the inside pocket of a securely buttoned garment and one of them jostles him, crowds him, jams him, and forces him against the other two, thereby accomplishing the double purpose of distracting his attention and preventing his recognizing the presence of a hand in his pocket, this is distinctly an assault. And if while this process is going on, the two abstract his money from his pocket, the person has been held up and robbed, even though the knaves have succeeded in so confusing him that he does not realize at the time he is being robbed."

DUTY OF COURT TO DISMISS ACTION FOR DIVORCE BROUGHT ON GROUND THAT DEFENDANT WAS HABITUAL USER OF DRUGS IF PENDING SUIT SHE CEASED TO BE.—A bill for divorce against a wife for being a habitual user of drugs was the cause shown in Smithson *v.* Smithson, (Miss.) 74 So. 149. It appeared however that while at the time of separation the wife was so addicted she was not guilty on the date of the institution of the suit. It was therefore held by the Supreme Court, reversing a decree of the chancellor dissolving the bonds of matrimony, that the complainant was not entitled to the relief prayed for. Cook, P. J., for the court said: "Concretely stated, was the trial court empowered to grant the relief it did grant, when it determined that the cause of complaint did not exist when the suit was

filed for relief? Broadly speaking, it is quite sure that a cause of action may exist to-day and not exist to-morrow; the cause of action might exist when the suit was begun and lost before the day of judgment. To illustrate, a suit may be brought on a promissory note, due and unpaid, but before the trial the note has been paid, and therefore a judgment cannot be entered. A trustee in a deed of trust may have a right to institute replevin for personal property after condition of the deed is broken, but if he postpones his suit until the debt secured is paid he loses his cause of action. Illustrations might be multiplied. The general rule is, and must be, that a cause of action must exist when the suit to enforce same is begun. If one of the parties to a marriage contract commits adultery, and the act is not condoned by the injured party, it is doubtless true that proof of repentance and promised reformation before suit for divorce is filed will not destroy the cause of action. It may be also true that habitual cruel and inhuman treatment, as a cause for divorce, is not satisfied by repentance. The first is a completed act—a fact established. The latter is a personal indignity that regrets and a promise of reform may not cure. In cases where desertion for stated statutory periods gives a cause of action, many courts have held that an offer to return will not take away the matured cause of action. In the present case, no moral crime is charged or proven, and no personal indignity has been inflicted upon the complainant. The story told by this record is a pathetic one. The defendant was a great sufferer for a long period, from no fault of her own, and, according to the evidence believed by the chancellor, she took drugs to palliate her physical pains to such an extent and period of time that she became an habitual and excessive user of these insidious drugs. Finally, the husband and wife separated, and then it was that defendant waged a brave fight, and before the bill was filed she had succeeded in overcoming the enemy and was restored to normal health of body and mind. . . . The Supreme Court of Massachusetts, in the case of Burt *v.* Burt, 168 Mass. 204, 46 N. E. 622, speaking of a case similar to the present case, under a statute making 'gross and confirmed drunkenness' a cause for divorce, said that 'gross and confirmed drunkenness' is a condition, and before a divorce could be granted under this statute, the condition 'must exist when the libel is filed.' It may be said that the facts of that case showed that the defendant still used drugs to a certain extent, but the court held that it was error to grant the relief because it was not shown that the use of the drug was excessive at the time the bill was filed."

LIABILITY OF FRATERNAL INSURANCE COMPANY FOR INJURY TO PERSON BEING INITIATED.—A case interesting merely because of the facts and not on account of the principle of law applied is Ange *v.* Sovereign Camp of Woodmen of the World, (N. C.) 91 S. E. 586, which was an appeal by the plaintiff from a judgment of nonsuit. From the testimony introduced by plaintiff and the admissions in the pleadings, it appeared or there were facts in evidence tending to show that the defendant, the Sovereign Camp of the Woodmen of the World, was a corporation duly organized and doing an insurance business on the fraternal plan as a principal or controlling feature, and that the Jamesville lodge was a branch or subordinate lodge of defendant through which, with others of like kind, individuals were admitted as members of defendant lodge under an initiation or ceremony as prescribed by a ritual, prescribed and issued by the defendant, the sovereign lodge, to its subordinates or branches; that, on the —— day of June, 1915, plaintiff, having applied for admission as member in defendant lodge, was being initiated, by the local lodge at Jamesville, and as a part of the ceremony then exercised, plaintiff was blindfolded and carried into a room, was placed on a machine similar to a pair of platform scales, and told to pull a certain lever which would register his strength, as this was required by the lodge and by the defendant, the Sovereign Camp; that plaintiff thereupon pulled the lever as directed and immediately received a severe shock of electricity which threw him out on the floor and caused him serious and painful injuries; 'that plaintiff was then carried to his room, was confined to his bed for some time, had several fits, has suffered serious and permanent injuries, and has since been unable to work. It was further shown that another individual had been admitted as member of defendant lodge a short time before the night in question, and that he too was placed on said machine and received an electric shock similar to that described by plaintiff. On these facts the Supreme Court reversed the judgment of nonsuit for reasons as follows: "It is now fully established that corporations may be held liable for neglect and malicious torts, and that responsibility will be imputed whenever such wrongs are committed by their employees and agents, in the course of their employment and within its scope. . . . In many of the cases and in reliable text-books, the term 'course of employment' is stated and considered as sufficiently inclusive, but whether one or the other descriptive term is used they have the same significance in importing liability on the part of the principal when the agent is engaged in the work that his principal has employed or directed him to do, and the conduct of the agent complained of occurs in the effort or endeavor to accomplish it. When such conduct comes within the description and constitutes an actionable wrong, the corporation principal, as in other cases of principal and agent, is liable not only for 'the act itself, but for the ways and means employed in the performance thereof.' . . . Applying these recognized principles to the facts in evidence, as they now appear, it is the fairly permissible inference that this plaintiff, while being admitted to membership in the defendant, the sovereign lodge, through an initiation carried on by a local lodge as its agent and for which the defendant had prescribed a ritual, has received serious, if not permanent, injuries by reason of a violent electric shock, used as and purporting to be a part of the ceremonial. And if these facts are accepted by the jury, and they further find that injuries of that character were received as the proximate result of the agent's conduct in conducting the initiation to membership, the defendant would be properly held liable as for a negligent wrong, and must respond in damages to the sufferer."

LIABILITY OF COUNTRY CLUB UNDER WORKMEN'S COMPENSATION ACT FOR INJURIES RECEIVED BY CADDY.—The right of a caddy to recover under a Workmen's Compensation Act against a Country Club was the question raised in Claremont Country Club *v.* Industrial Accident Commission, (Cal.) 163 Pac. 209, which was a proceeding to review an award of the Industrial Accident Commission in favor of a boy 14 years of age who while caddying for a member of the Claremont Country Club leaned against the handrail of a bridge spanning a small creek on the golf course of the club, and was injured by the rail giving way. The boy while in the general employ of the club was at the time under the immediate control of the member for whom he was caddying. The award was affirmed. Judge Henshaw writing the opinion of the court said: The principal contention of petitioners is that the boy was not an employee of the country club within the meaning of the provisions of the Code and the terms of the Workmen's Compensation Act (St. 1913, p. 279). The undisputed facts are that the club owns and maintains a golf links for the pleasure of such of its mem-

bers as desire to indulge in the game. The general control over this sport is vested in appropriate committees selected from the club members. Many golfers have desired and do desire the services of attendants to carry their golf bags, to aid in the search for the ball, and to perform other like familiar services. For these members the club provides caddies, and over them is a paid employee known as the caddy master. The club also maintains a caddy house, which is the station of the caddies until their services are requisitioned. The caddies are graded into three classes based upon their records and abilities in the service, the best belonging to class A, the next best to class B, and the beginners and least efficient to class C. A class caddies are paid 60 cents, B class caddies 50 cents, and C class caddies 40 cents a game. A player requisitioning a caddy may not designate the boy whose services he desires. His request is made to the caddy master, who, under a system, summons the caddy whose turn it is to serve. The caddy is supplied with a card, whereon at the conclusion of the game the member makes his report to the caddy master, with remarks touching the service and qualifications of the boy, and from time to time the caddy master regrades his caddies in accordance with these reports. At the close of the game the player hands to the caddy master, with his report, the amount earned by his caddy, and this amount is immediately delivered by the caddy master to the boy. Thus each player pays the caddy and the indirect method of payment through the caddy master is apparently designed for the twofold purpose of convenience in making change and as a check on 'tips' or donation by the members to the caddy in excess of the actual amount earned. The boys are taken on by the club through the caddy master or Greens Committee, and the caddy master or Greens Committee is empowered to discharge a caddy, or, in other words, to forbid him to frequent the golk links and seek and secure employment. Upon the other hand, while actually caddying the control of the activities of the boy is wholly with the member using him, and the club, as a club, has of course no means of knowing what particular orders or directions a member may give to his caddy, nor what unusual or dangerous duties he may call upon him to perform. For these reasons petitioners argue that the caddies are not employees of the club, and that 'all that the club does is to afford boys who wish to serve as caddies an opportunity for employment by the members of the club who play golf.' . . . The employment and discharge of the caddy during all of the time when he is not actually in the service of a member is wholly under the control of the country club, and this is the determinative fact in the matter. In certain of its features the case, then, is not dissimilar to Gaines *v.* Bard, 57 Ark 615, 22 S. W. 570, 38 Am. St. Rep. 266, where it is held that a bathroom attendant, selected and subject to be discharged by the owner, and performing service for him in keeping the bathrooms and the adjacent halls clean, is his servant, notwithstanding the fact that he paid such attendant no compensation, and the only compensation which he received was the donations from the patrons under whose control he was performing service for them. The foregoing, we think, will certainly show the inappositeness of such authorities as Brown *v.* Smith, 86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456, where the holding is merely that where a master has hired his servant to another, giving the other the complete and absolute control and direction of the servant, with the exclusive right to discharge him, the original master is not liable for his negligence. Wherefore upon this point our own cases, above cited, dealing with the general features of the relationship of employer and employee and master and servant do not call for review, for these caddies are employed by the club, are controlled by the club, and the service which they render simply happens from its nature to be directed to contribute to the convenience and pleasure of the individual members of the club."

## New Books

*The Rule-Making Authority in the English Supreme Court.* By Samuel Rosenbaum, LL.M., Gowen Fellow in the Law School of the University of Pennsylvania 1913-15. Boston: The Boston Book Company. 1917.

In these days when we are looking to England for guidance in the matter of simplified court procedure the subject of this volume will be welcomed. The author spent two years in London and there collected the material for articles which appeared in the *Pennsylvania Law Review,* the *Law Quarterly Review,* the *Law Magazine and Review,* and the Journal of the Society of Comparative Legislation. These articles make up Mr. Rosenbaum's book. A preface written by T. Willes Chitty of the Inner Temple, Barrister-at-Law and a Master of the Supreme Court of Judicature, says: "I have read Mr. Rosenbaum's essays with great interest, and can testify to the accuracy of the statements contained in them. Indeed, I am astonished at the painstaking research and labor which he has devoted to the task, and at the practical, detailed, and accurate knowledge of our procedure which he has acquired and which he lays before his readers."

The English Judicature Acts and the Rules of Court contained in the schedule thereto came into force in 1875. The rules of 1875 were superseded by those of 1883, and since 1883 there have been numerous amendments. The author has dealt with the subject from the historical point of view, and has traced the rules from their introduction, through the various amendments, and down to the present time. Mr. Chitty says: "From over forty years of practical experience, I can thoroughly endorse Mr. Rosenbaum's conclusions as to the advantage to be obtained by 'entrusting the regulation of Civil Procedure to a professional body rather than to a well-intentioned but overworked legislature.' "

There is now pending a bill in the New York legislature looking to the simplification of New York court procedure, the purpose of the bill being to give to judges enlarged powers in the matter of rules of procedure, and it will be remembered that the judges of the United States Supreme Court some years ago, after a consideration of the English methods of procedure, drew up rules for the conduct of cases in equity in the federal courts by virtue of power given them by Congress. The tendency is pronounced to follow the English system of letting the judges rather than the legislature determine court procedure, and the author's conclusions concerning the efficiency of English methods justify the tendency.

*The Public Defender.* By Mayer C. Goldman of the New York Bar. With a foreword by Justice Wesley O. Howard of the Appellate Division, New York Supreme Court, Third Department. New York and London: G. P. Putnam's Sons, The Knickerbocker Press. 1917.

We have heard much talk about the necessity of a public defender to represent indigent persons accused of crime, and the volume at hand makes a strong case for the creation of the office. The author prepared the Public Defender bills which were introduced in both houses of the New York legislature in 1915 as well as the proposed amendment submitted in the same

year to the Constitutional Convention of New York. The subjects dealt with in the volume include the public defender idea; the injustice of the "assigned counsel" system; public prosecution and prosecutors; analysis of the public defender; the ancient conception of crime; specific objections considered; the march of the movement, etc. Justice Howard in his foreword says: "The provision for a Public Defender should be embedded in our statutes. No law could be more economical—none more humane."

*Unfair Competition.* By William H. S. Stevens, Ph.D., Sometime Professor of Business Management in the Tulane University of Louisiana. Chicago, Illinois: The University of Chicago Press. 1917.

It seems that the subject of this volume first attracted the attention of the author when he was teaching and studying at the Wharton School of the University of Pennsylvania in 1911-1912. He then collected data which later formed the basis of two articles appearing in the *Political Science Quarterly,* and these articles with considerable expansion and revision make up the book at hand, which is a plea for the prohibition of unfair competition on the ground that without such prohibition no satisfactory solution of the trust problem can be arrived at. The author considers such questions as local price cutting; operation of bogus "independent" concerns; fighting instruments; "tying" clauses; exclusive arrangements; black lists; rebates; boycotts; white lists; espionage; coercion, etc. The text is full of illustrations, many of them drawn from court records, and the material is well handled. The price of the volume is $1.50 net.

## News of the Profession

THE TEXAS BAR ASSOCIATION will meet in annual convention at Houston, Texas, on July 3, 4, and 5.

MONTANA JUDICIAL APPOINTMENT.—W. D. Rhoades of Helena has been appointed to the bench of the Montana District Court.

THE MARYLAND STATE BAR ASSOCIATION will hold its 1917 session at Atlantic City, N. J., on June 21, 22 and 23.

MUNICIPAL COURT APPOINTMENT.—Governor Brough of Arkansas has appointed James D. Cook to the bench of the Texarkana Municipal Court.

NAMED CITY ATTORNEY.—Mayor Rolph of San Francisco has named George Lull as City Attorney to succeed Percy V. Long, resigned.

BECOMES PRESIDING JUDGE.—Judge J. B. Brown of Cullman has become presiding judge of the Alabama Court of Appeals, succeeding the late Judge Pelham.

ILLINOIS STATE BAR ASSOCIATION.—The next meeting of the Illinois State Bar Association will be held at Danville, Ill., on May 31, June 1 and 2.

FORMER ATTORNEY GENERAL OF ILLINOIS DEAD.—Maurice T. Maloney, who was attorney general of Illinois under Governor Altgeld, died at Ottawa, Ill., on March 9.

DEATH OF NEW JERSEY LAWYER AND AUTHOR.—William Raimond Baird, lawyer, lecturer and author of numerous books on college fraternities, died at South Orange, N. J., on March 15, aged 60.

ALABAMA JUDGE DEAD.—Judge John Pelham, a member of the Alabama Court of Appeals since that court was organized in 1911, died at Montgomery, Alabama, on March 5, aged 52.

NEW MEMBER OF OKLAHOMA SUPREME COURT.—Thomas H. Owen, former judge of the Criminal Court of Appeals, has been appointed by Governor Williams to the bench of the Oklahoma Supreme Court.

APPOINTED TO BENCH IN OHIO.—R. M. Morgan of Cleveland has been appointed by Governor Cox of Ohio to the Common Pleas bench to succeed Judge Leighley, recently elevated to the Court of Appeals.

ALABAMA STATE BAR ASSOCIATION.—The executive committee of the Alabama State Bar Association has decided to hold the next annual session of the association at Birmingham, Ala., on July 12, 13 and 14.

PROMINENT JUDGE AND MASON DEAD.—John B. Fithian, judge of the Probate Court of Will County, Illinois, and known throughout the state as an authority on Masonic law, died at Joliet, Ill., on March 8, aged 68.

DEATH OF PROBATE JUDGE IN ILLINOIS.—Albert T. Larden, Probate Judge of La Salle County, Ill., died at Ottawa, Ill., on April 1, aged 54. At the time of his death, Judge Larden was serving a sixth successive term on the bench.

NEW FEDERAL JUDGE IN LOUISIANA.—George Whitfield Jack, former United States district attorney, has been appointed judge of the Federal Court for the Western District of Louisiana, to succeed the late Judge Alec Boarman.

CHANGES AMONG FEDERAL ATTORNEYS.—W. D. Kyser has been appointed United States district attorney at Memphis, Tenn.—Charles H. Graves, former Secretary of State of Ohio, has been named assistant United States attorney at Toledo, Ohio.

PROMINENT NEW YORK LAWYER DEAD.—William F. Sheehan, from 1892 to 1895 lieutenant governor of New York state and a lawyer who was prominent in state and national politics for many years, died at New York city on March 14, aged 58.

RICHARD OLNEY DEAD.—Richard Olney, Attorney General and Secretary of State under President Cleveland, and one of the foremost figures in the political and legal circles in the state of Massachusetts, died at Boston on April 8, aged 82 years.

THE UTAH BAR ASSOCIATION held a special meeting at Salt Lake City on March 12 to consider the proposed legislative measure increasing the number of judges on the State Supreme bench from three to five. The proposition received almost unanimous indorsement.

NEW ASSISTANT ATTORNEY GENERAL IN MINNESOTA.—Attorney John E. Palmer of Fairmont has been appointed Assistant Attorney General of Minnesota under a recent act of the legislature providing for the appointment of two additional assistants by the Attorney General.

AGED ILLINOIS JURIST DEAD.—Arba N. Waterman, former judge of the Illinois Circuit Court and Civil War veteran, died at Chicago on March 16 at the age of 81 years. In 1915, a conservator was appointed for Judge Waterman and since that time his estate has been involved in constant litigation.

WOMEN LAWYERS TO ORGANIZE.—Plans for organizing the eighty women lawyers in Washington, D. C., into a bar association, which will be the third of its kind in the country, were

formulated recently at the first anniversary dinner of the women lawyers who marched in the suffrage parade four years ago.

New Attorneys for Interstate Commerce Commission.—Boyd S. Beckington of Rockford, Ill., has been appointed attorney for the Interstate Commerce Commission, with headquarters at Washington, D. C.—Albert L. Hopkins of Chicago has resigned as special assistant United States district attorney to become assistant general counsel for the Interstate Commerce Commission.

Australian Barrister Dead.—John Gavan Duffy, widely known barrister and publicist, is dead in Melbourne, Australia. Mr. Duffy was a member of several ministries, variously as postmaster general, attorney general and minister without portfolio. In 1897 he was the representative of the Australian colonies at the Universal Postal Union congress in Washington. He was born in Dublin in 1844.

Named as Assistants to United States Attorney General.—Francis J. Kearful, of San Antonio, Texas, who has served on several occasions as special assistant attorney general, has been advanced to the position of assistant attorney general of the United States with headquarters at Washington, D. C.—Robert C. Bell, of St. Joseph, Mo., has been appointed special assistant attorney general of the United States in charge of the Minneapolis district.

Valuable Law Books Given to Court.—Rare and valuable law books, some of which are more than a century old, have been presented to the Minnesota Supreme Court by John W. Willis, a St. Paul attorney. Mr. Willis's donations include 17 volumes of "Reports of Cases Argued and Determined in the Supreme Judicial Court of the Commonwealth of Massachusetts." The first volume, bearing date in the year 1816, was prepared by Ephraim Williams, and is the first official report of the Supreme Judicial Court of Massachusetts.

Noted Paris Attorney Dead.—Fernand Labori, who was attorney for Captain Alfred Dreyfus, died at Paris on March 14. Labori sprang into international prominence as the result of his activities in the Dreyfus case, in the late nineties. A conspicuous service in this connection was performed by him in behalf of Emile Zola, when that author was accused of libeling the French president and the French army in his defense of Captain Dreyfus. Labori was attorney at various times in the cases of Americans engaged in litigation in France. He was also counsel for Mme. Caillaux. He was born in Rheims in 1860.

## English Notes*

Hearing Cases in Camera.—In Scott *v.* Scott (109 L. T. Rep. 1) it was clearly laid down that courts of justice have power to hear cases in camera where a hearing in open court might defeat the ends of justice, and Lord Loreburn gave a particular instance when he said: "Tumult or disorder, or the just apprehension of it, could certainly justify the exclusion of all from whom such interruption is expected, and, if discretion is impracticable, the exclusion of the public in general." Those words were particularly apt in the case of the Irish rebels who applied for writs of habeas corpus, the rules nisi for which were heard before a specially constituted Divisional Court of seven judges recently. Fourteen grounds had been put forward for granting the writs, none of which had any substance save one—namely, that the court-martial which tried the prisoners sat with closed doors. While refusing to accept the view that the "court" is "open" although the public is excluded, if the accused and his advisers are present, the Divisional Court was unanimously of opinion that every court can exclude the public if necessary for the proper administration of justice. It was further of the opinion that in the circumstances of the particular trials a hearing in camera was shown to be necessary.

Wearing a Hat in Court.—The prompt removal by the jailer of the cap from the head of an old man, who when placed in the dock at the Guildhall refused to take off his hat for anyone but the King, may render it of interest to recall the fact that the Lord Advocate for Scotland has the privilege of being covered in Scottish courts, a privilege obtained in the days of Charles I. by Lord Advocate Hope, who had two sons members of the Scottish Judiciary, before whom he himself pleaded. The Earl of Abington of the day, when tried before Lord Kenyon, as Lord Chief Justice, for libel at the criminal side of the court, claimed to be entitled to wear his hat in court as a peer of the realm, a claim which the court refused to recognize. In the seventies of the last century a Quaker gentleman used to attend the opening of the assizes in Limerick and to occupy a prominent position in court with his hat on, refusing to be uncovered. The direction to the police to remove his hat, or the ordering of him out of court by the judge, or a threat of imprisonment for contempt, was quite the usual incident of an opening of an assize court in Limerick. At length a well-known Irish judge with a great sense of humor and knowledge of human nature refused to see the gentleman with the hat on and told the police constables to take no notice of him. He seemed surprised and disappointed at not creating a sensation, and after a few moments left the court crestfallen, and never appeared in it afterwards.

Lotteries.—A question addressed by Sir Charles Henry recently to Mr. Bonar Law as Chancellor of the Exchequer is illustrative of the tendency to favor the policy of lotteries. Mr. Bonar Law was asked whether he was aware that a substantial sum had been subscribed to the War Loan through the medium of sweepstakes that were organized; whether he would recognize the attraction to a certain portion of the population of an investment where prizes are one of the features; and whether he would take into consideration, in order that the section of the population referred to may be attracted to take a financial interest in the country, the issue of a further loan in the shape of premium bonds. When in 1755 the Government had resolved to raise a million, by way of lottery, for military purposes, no less than £3,800,000 was at once subscribed. Public lotteries in England, though more than once forbidden, enabled the Government to raise money with so little unpopularity that they have been repeatedly established. They were not finally suppressed in England till 1823. Westminster Bridge, which was begun in 1736, was built chiefly from the produce of lotteries. In 1753 lotteries were established to purchase the Sloane collection and the Harleian manuscripts, which were combined with the Cottonian collection and deposited in Montagu House, under the name of the British Museum. Addison mentions in a letter that he had drawn a prize of £1000 in a lottery, and Fielding wrote a satire on the passion for lotteries prevalent in his time.

Gifts by Will of "Money."—In the recent case of Re Gliddon; Smith *v.* Gliddon (116 L. T. Rep. 13; (1917) 1 Ch. 176), it appeared that a testatrix by will gave to her brother E. J. G.

* With credit to English law periodicals.

and her niece G. M. Smith "all my moneys to be equally divided between them, and to the aforesaid Grace May Smith all my household furniture and effects." The testatrix died two days after executing her will. At the date of her will she had £32 10s 7d. at the bank, and some furniture and effects of very trifling value. She was also entitled to a moiety of a reversionary interest in certain investments amounting to £2430, on which reversionary interest there was a mortgage for £750. At the time of her death she had only £1 14s 8d. at the bank. A question arose as to whether the gift of "all my moneys" amounted to a residuary bequest, so as to pass the reversionary interest, and it was held by Mr. Justice Younger (following Lowe *v.* Thomas, 5 De M. & G. 315, and distinguishing Re Skillen; Charles *v.* Charles, 114 L. T. Rep. 692; (1916) 1 Ch. 518) that it did not. His Lordship did not consider, having regard to Lowe *v.* Thomas, that there was a sufficient context in the will to enable him to attribute to the words "all my moneys" a signification wide enough to carry the residuary estate, including the reversionary interest, though he would not have had much difficulty in deciding the question to his own satisfaction if it had not been for that case. Perhaps in course of time the case of Lowe v. Thomas will have been distinguished sufficiently often to deprive it of much of the weight which at present it has.

WOMEN AS SOLICITORS.—Bebb *v.* The Law Society (110 L. T. Rep. 353; (1914) 1 Ch. 286), decided by the Court of Appeal and affirming Mr. Justice Joyce, laid it down that a woman was not a "person" within the meaning of the Solicitors Act 1843 and subsequent Acts or of the regulations and rules based on them, and consequently that the secretary of the Law Society acted rightly in returning to the plaintiff, Marjorie Bebb, her check for £4, being her entrance fee for the preliminary examination, together with a statement that she would not be admitted to the examination. The court based its view on ancient usage dating long before the Solicitors Act 1843 and on the construction of the Act, which negatived an intention by Parliament to destroy the disability. Lord Buckmaster's Bill before Parliament can be subject to no such construction, for it roundly provides that a woman shall not be disqualified by sex or marriage for admission or for acting or practising as a solicitor, but it does not grant these indulgencies to Scotland or Ireland. This bill introduces women, single or married, into public offices of great importance, for it is presumed that it involves or will involve their acting sooner or later in the various capacities of clerks to justices or to guardians, and so on. A woman solicitor as an officer of the court will acquire a status of greater responsibility than that which her sister as a medical practitioner has gained during the past years. It is possible to find among the ancient authorities records of women holding various public offices in bygone years. Thus, Queen Eleanor was Keeper of the Great Seal in 1253, another woman was by deputy a Lord High Constable, and others have been sextons, overseers, and governors of workhouses. It will be interesting to see now whether Parliament will look for means to reverse the decision by which one of the Inns of Court refused admission to Miss Cave (see *Times*, Dec. 3, 1903). Though Benchers stand in a peculiar position, they are not immune from interference.

BRITISH AND AMERICAN CONSTITUTIONS.—The study of the working of the British Constitution by way of contrast and comparison with its many versions is always of interest, says the *Law Times*. The taking not only of the Senate, but even of the Congress, of the United States by President Wilson fully into his confidence at every stage of the strained relations between the United States and Germany may be regarded as the result of the provisions of the American Constitution. The President cannot declare war, for that belongs to Congress, and treaties require the approval of two-thirds of the Senate. Thus there is of necessity an open as contrasted with a secret diplomacy. When on March 19, 1886, a resolution was proposed in the House of Commons "that in the opinion of this House it is not just or expedient to embark in war and enter into engagements involving grave responsibilities for the nation and add territories to the Empire without the knowledge and consent of Parliament," the motion was defeated by four votes only. It was opposed by Mr. Gladstone as Prime Minister and by Mr. (Viscount) Bryce as Under-Secretary of State for Foreign Affairs, who both contrasted the control of the American Legislature over foreign affairs with the lack of control of the English Legislature over foreign policy, and justified the distinction in the case of England by drawing differences between the positions of England and America which do not exist in the present crisis. The power of secrecy which Mr. Gladstone so strongly deprecated, but which he admitted in the same speech had been in vogue in Parliament till the close of the eighteenth century, has not hitherto in the present crisis been brought into exercise in America. Viscount Bryce on the same occasion drew a distinction between the British and American systems which the present crisis has demonstrated to be of a character lacking in reality to persons acquainted with the present situation and the attitude of the United States to European powers. "With regard," he said, "to the method adopted by the United States of controlling the foreign policy of the executive, that country was in a totally different position from that occupied by any European power. The United States had no foreign policy on this side of the Atlantic, and their foreign policy on their own side was very simple."

INJURED WORKMAN'S ACCEPTANCE OF LUMP SUM.—Where a lump sum has been accepted by an adult workman some little time after an accident in satisfaction of any claim under the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) and no weekly payment has been made to him, any further claim to compensation under the act with reference to that accident is barred, even though the gross sum so paid to him was calculated with reference to the amount of the weekly payment under the act, and it is not necessary that any memorandum of agreement shall have been approved of and recorded. Such was the decision of the Court of Appeal in Ryan *v.* Hartley (106 L. T. Rep. 702; (1912) 2 K. B. 150). And although the same was cited to the learned County Court judge before whom came the recent case of Hudson *v.* Camberwell Borough Council, yet, so obsessed was His Honor by the notion that the agreement in that case had been obtained by fraud, that he failed to give effect to what had been thus distinctly laid down by the Court of Appeal in the earlier case. The learned judges of the Court of Appeal (Lord Cozens Hardy, M. R.; Lord Justice Warrington, and Mr. Justice A. T. Lawrence), however, entirely repudiated the idea of any fraudulent dealings being able to be relied on, none such having been attempted to be proved. And the Master of the Rolls took the opportunity again to enunciate what he had answered to the question that he himself propounded in Ryan *v.* Hartley (ubi sup.): "Is there anything in the Workmen's Compensation Act 1906 preventing an adult workman before entering a claim for an award under the act, and before any payment of a weekly sum has been made to him, from coming to an arrangement by way of compromise with the employer? Is there anything to prevent the one from agreeing to give and the other from accepting so much money in satis-

faction of all his claims?" All that his Lordship could discover in the act on the point were the provisions in sections 9 and 10 of the second schedule thereto. Those certainly do not debar the acceptance of a lump sum by an injured workman when he is under no disability. But the fact that there is open to him such an obviously reasonable course, if he is minded to adopt it, was emphasized in the present case. And perhaps so not without some need for a further statement of the true position.

Evidence of Waiver of Objections to Title.—In the recent case of Alderdale Estate Company Limited *v.* McGrory the question raised was whether, upon an order being made for specific performance of an open contract for the sale of land, and an inquiry directed in general terms as to the vendors' power to show a good title, they were at liberty to give evidence after judgment that the purchaser had knowledge of certain objections to their title and had waived the same before entering into the contract with them. The objections to the defects in the vendors' title were such as to be irremediable. This very question was dealt with in Upperton *v.* Nicholson (25 L. T. Rep. 4; L. Rep. 6 Ch. App. 436), in which case Curling *v.* Austin (2 Dr. & Sm. 129) was explained. And after a careful consideration of those authorities, as likewise of the statement in Fry on Specific Performance (5th edit., p. 184, s. 373), the learned Vice-Chancellor of the County Palatine of Lancaster came to the conclusion that the vendors were not entitled to give any evidence of the kind which they sought to adduce. The learned judges of the Court of Appeal (Lord Cozens-Hardy, M. R.; Lord Justice Warrington, and Mr. Justice A. T. Lawrence), on the contrary, took the view that the evidence was admissible. The contract being silent as to title, it was an implied term of the contract that a good title should be shown by the vendors. That being so, the implied term was, as Lord Cozens-Hardy pointed out, one that could not be insisted on if it were possible for the vendors to show that the purchaser was aware of the defects in their title. Could they do that on an inquiry as to title? Lord Justice Warrington laid emphasis on the distinction that was drawn by Lord Justice James in his judgment in Upperton *v.* Nicholson (ubi sup., at p. 442 of L. Rep. 6 Ch. App.) between the case of a vendor attempting to set up a waiver by the purchaser of his particular objections and a vendor seeking to establish that the purchaser would never under the contract of sale be entitled to raise those objections: (see, further, Re Gloag and Miller's Contract (48 L. T. Rep. 629; 23 Ch. Div. 320). The learned Vice-Chancellor had decided against the vendors in the present case on the former ground. He considered that the doctrine as to waiver applied. But the error in so doing becomes plainly apparent when once the distinction between the two cases is fully recognized. It was open, therefore, to the vendors to prove that the purchaser contracted to buy the property in question with notice that a good title thereto could not be shown.

Is a Mother in Loco Parentis?—A mother is a parent, but she is not necessarily in loco parentis to her children as the term is understood in the law. It made all the difference in the recent case of Re Eyre, where there was a contingent bequest of a leasehold house by a mother to an infant daughter. Mr. Justice Younger held that, as the testatrix had not maintained the daughter, and as the house was not vested in trustees for the daughter so as to be segregated for her benefit, the rents and profits during the contingency fell into the residue. In White and Tudor's Leading Cases, 8th edit., vol. 1, p. 897, it is stated that "The general rule [as to interest] is modified in the case of a legacy, whether vested or contingent, given to an infant legitimate child by its father or mother, or to an infant by a person in loco parentis, where no other provision is made by the testator for the child's maintenance." Lord Hardwicke in Beckford v. Tobin (1 Ves. Sen. 308, at p. 310) says, with reference to legacies bearing interest from a year after the death: "There are exceptions thereto; one of which is the case of a legacy by a father or mother to a legitimate child, whether by way of portion or not. If it is given generally, the court will give interest from the death to create a provision for its maintenance; and if payable at a certain age, and the child not otherwise provided for, the court will give interest in the meantime before that age." In Crickett *v.* Dolby (3 Ves. 10) the Master of the Rolls (Sir Richard Arden) said: "The rule is clear that a legacy payable at any given time whatsoever does not carry interest till that time, whether it is a vested interest or not: the time of payment must govern the commencement of interest, with this difference only, that a legacy given by a parent to a child shall carry interest from the death of the testator, on account of the obligation attaching upon the person who gives it, and because it is in the nature of a portion." It will be noted that the exception referred to is in the case of a "parent," not necessarily a "father." The doctrine of ademption and satisfaction is founded on the presumption against double portions, and applies only in the case of fathers and persons who are in loco parentis: (Seton's Judgments and Orders, 7th edit., p. 1667). Mr. Justice Stirling in Re Ashton (77 L. T. Rep. 49; (1897) 2 Ch. 574) stated that "Prima facie the duty of making a provision for a child falls on the father, but may fall on or be assumed by some other person. I do not say that in no case and under no circumstances can the duty fall on or be assumed by the mother of the child; but it appears to me that the burden of proving such to be the case lies on those who assert the fact so to be." The Court of Appeal reversed Mr. Justice Stirling's decision on the facts without discussing the law as to double portions (77 L. T. Rep. 582; (1898) 1 Ch. 142). It would therefore appear that a mother is not in loco parentis unless she takes the place of the father.

Inviolability of Ambassadors.—The statement that Mr. Gerard, the late American Ambassador at Berlin, had been prevented, even for a moment, from leaving Germany, on the ground that he was to be retained as a hostage for the safe conduct of Count Bernstorff from the United States, now shown to be inaccurate, seemed incredible. Inviolability is an inherent and essential quality of the public Minister, and the office cannot exist without it. The London *Times* suggests that in the present war the Rumanian representatives at the courts of the Central powers appear to have been kept as a kind of hostage for the German and Austrian representatives at Bukarest, and that an act of this character which would, of course, in itself be a shocking infraction of the elementary principles of international morality, might give ground to the detention as a hostage of Mr. Gerard by Germany. The making of an ambassador the subject of reprisal under any circumstances, however great the provocation, is an unpardonable crime against the law of nations. To give a single illustration: An ambassador cannot be arrested under ordinary criminal process; he may, however, be arrested, by a high assertion of sovereign power, for intriguing against the country in which his mission lies. Thus in 1717 Gyllenbourg, the Swedish Ambassador to St. James's, contrived a plot to dethrone George I. He was arrested, his cabinet broken open and searched, and his papers seized. Sweden arrested the British Minister at Stockholm by way of reprisal. The Regent of France interposed his good offices, and the two ambassadors were shortly afterwards exchanged. "The arrest," writes

Wheaton, "of Gyllenbourg was necessary, but on no principle of international law can the arrest of the British Minister at Stockholm by way of reprisal by Sweden be made justifiable." It is interesting to recall a celebrated discussion between the American and Prussian Governments in the case of the illustrious Wheaton arising out of his residence as ambassador at Berlin in 1839. The question of controversy was how far the personal effects of a public Minister are liable to be seized and detained in order to enforce the performance on his part of the contract of hiring of a dwelling house inhabited by him. According to the Prussian Civil Code, "the lessor is entitled as a security for the rent and other demands arising under the contract to the rights of a Pfandglanbiger" (that is, a creditor whose rights are secured by hypothecation) "upon the goods brought by the tenant upon the premises and there remaining at the expiration of the lease." Under this law the proprietor of the house at which the Minister of the United States—Mr. Wheaton—accredited at the Court of Berlin resided claimed the right of detaining the goods of the Minister found on the premises at the expiration of the lease in order to secure the payment of damages alleged to be due on account of injuries done to the house during the contract. The Prussian Government decided that the general exemption under the law of nations of the personal property of foreign Ministers from local jurisdiction did not extend to this case, where it was contended the right of detention was created by the contract itself and by the legal effect given to it by the local law. The American Minister maintained, however, that such a decision was contrary to the principle of diplomatic immunity, inasmuch as it placed diplomatic agents on the same footing with the subjects of the country. "The publicists," Mr. Wheaton proceeds, "who have referred to this case appear to support the arguments of the United States Minister."

## Obiter Dicta

FAITES VOS JEUX!—Field *v.* Kieser, 135 N. Y. Supp. 1094.

AFTER UNCLE'S MONEY.—Nephews *v.* United States, 43 Ct. Cl. 430.

A CLOSE CORPORATION.—Pintsch Compressing Co. *v.* Bergin, 84 Fed. 140.

DEFIES ALL SEASONS.—Ford *v.* Summers, 26 S. W. Rep. 459; Ford *v.* Winters, 45 Mo. 448.

STUNG.—In Law *v.* Nettles, 2 Bail. L. (S. C.) 447, jurisdiction of a civil court over a military officer was denied.

DELAWARE CHARTERS
IMPORTANT AMENDMENTS
TO THE DELAWARE LAW (March 20, 1917).
STOCK WITHOUT PAR VALUE
The most modern and scientific method of corporate organization. Write for full particulars of this and other important amendments.
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SELLING FLIVVERS?—In State *v.* Ford, 168 N. Car. 165, the defendant was prosecuted for obtaining money by false pretenses.

POOR BUSINESS.—In People *v.* Allcutt, 117 N. Y. App. Div. 546, the evidence showed that the defendant advertised himself as a doctor.

ALL A JOKE.—In Jester *v.* Jester, 4 Boyce (Del.) 542, the plaintiff sought a divorce because she married when too young to know what she was doing.

TRUE TO HIS NAME.—In State *v.* Bobbitt, 242 Mo. 273, it appeared that one Noble Peacher, after entering into a conspiracy to commit arson, turned state's evidence.

NO MONOPOLY OF IGNORANCE.—"This court has little knowledge of gold certificates, either individually or judicially."—Per Hill, C. J., in Smith *v.* State, 8 Ga. App. 462.

NOR EVER WILL.—"Nobody has yet fixed the limit of a thrifty woman's capacity to save, and thus turn into dollars the cents which a more prodigal husband would waste."—Per Gage, J., in Fewell *v.* Hall, 101 S. Car. 249.

CLEAN SNOW.—State *v.* Snow, 130 Minn. 206, was an appeal from a judgment of conviction in a proceeding brought to charge the defendant with the paternity of an illegitimate child. The appellate court reversed the judgment.

OVERDOING IT.—Notwithstanding her name, the plaintiff in Waters *v.* Kear, 168 N. Car. 263, objected strenuously when the defendant diverted surface waters upon her lands. Sort of carrying coals to Newcastle, we take it.

DISCRIMINATORY LEGISLATION.—"Any person who shall attempt the cure of another by practice of . . . anaana, hoopiopio, hoouanauna or hoomanamana . . . shall . . be fined not less than one hundred dollars nor more than two hundred dollars, or be imprisoned at hard labor not exceeding six months." Revised Laws Hawaii, section 1077.

FOLLOWING PRECEDENT.—A correspondent sends us a copy of the following order of the Supreme Court of the District of Columbia, entered on January 19, 1917, with the remark that adherence to technical form is noticeable in the closing words:

> Ordered—That out of respect to the memory of the late Admiral George Dewey, whose obsequies will he held Saturday, January 20, the special terms of this court adjourn at the close of business to-day until Monday next. It is further ordered that the office of the clerk be closed Saturday as a mark of respect to said decedent.

NOT ONLY PATRONIZED BUT COPIED.—In Baumeister *v.* Markham, 101 Ky. 122, an action to recover damages for personal injuries consisting of a broken leg, it was urged by the defendant that the feme plaintiff was not entitled to recover special damages because she was "a burlesque opera bouffe artist" and part of her business was to go on the stage and "show her limbs in silk stockings." The court dismissed the contention with the remark that such performances were "tolerated by law and patronized openly and freely by the public." Surely the world has moved in the twenty years since that decision was rendered. Would any attorney seriously advance such an argument to-day?

AN EXTEMPORANEOUS GEM.—At a hearing in a bankruptcy case before Federal Judge Landis in Chicago recently, it ap-

peared that one of the creditors was the owner of several salary loan agencies in the city of Chicago but was himself a resident of another city. During the course of the proceedings, this creditor suddenly announced that he wished to withdraw his claim against the bankrupt. Judge Landis immediately turned to the clerk of the Court and with scathing sarcasm dictated the following order: "Comes now one —— in his own improper person, and in consideration of divers and sundry payments upward of 20 per cent per month desires to withdraw as a creditor of said ——. In consideration of his philanthropic and spiritual reputation, and the fact that his real business is not known in his own community, his claim is hereby withdrawn."

LIKES HIS STRAIGHT!—Mr. Justice Holmes of the United States Supreme Court does not like music with his meals. Certainly no other inference can be drawn from his remarks in the recent case of Herbert *v.* Shanley Co., 242 U. S. 591. Speaking to the question whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringed the exclusive right of the owner of the copyright to perform the work publicly for profit, Justice Holmes said in part: "The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough."

CAN WE BEAT IT?—Law reformers are wont to descant on the swiftness of English justice as compared with the tardiness of court procedure in this country. Comes now the London *Times*, however, and relates the following incident without turning a hair:

> At the conclusion of the hearing in the case of the Amalgamated Properties of Rhodesia (Limited) against the Globe and Phœnix Mining Company (Limited), Mr. Upjohn, K. C., concluded his speech for the defendants, having addressed the court for forty-five days, the hearing having occupied 144 days in all. He said he was not sure whether he ought not to apologize for the length of time he had occupied, but he felt that he could not blame himself. He had more than 50,000 questions and answers to go through 5000 pages of printed evidence and 256 exhibits. In reading, noting and synthesizing the case for the purpose of placing it before the court he had occupied 84 days, not to speak of the work done by the other counsel for the defendants. Justice Eve said Mr. Upjohn's great speech was bound to provoke a great deal of criticism because of its length. But, having listened to every word of that speech, he was well qualified to offer an opinion upon it, and he wished to express his appreciation of it as an example of unwearying industry.

Now, without question, there have been longer trials than this in the United States. But can anyone recall a speech of equal length by either counsel or court in the course of a legal proceeding?

EVIDENTLY "FOR WORSE."—Discussing the conjugal infelicities of the parties to Main *v.* Main, 168 Iowa 356, an action for a divorce, the court writes thus entertainingly: "At the time of the trial plaintiff was sixty-six and the defendant forty-two years of age. The defendant had been twice married, once widowed and once divorced. Plaintiff had been twice married and twice divorced—each time at the suit of his wife. He had subsequently been defendant in an action for preach of promise and had sought the graces of other women with a fervor not altogether platonic. The parties did not drift into love unconsciously as sometimes happens with younger and less experienced couples. Both knew from the start exactly what they wanted. She wanted a husband with money—or money with a husband. He wanted a wife to adorn his house and insure that conjugal felicity of which fate and the divorce court had repeatedly deprived him. With an ardor the warmth of which was in no manner diminished by the frosts of age, he pressed his suit for defendant's favor for a period of a year and a half, though it is but fair to say the speed of his wooing was held in check by the pendency of the damage suit above referred to, which had been brought against him by another member of the sex which has been the bane of his strenuous life. He visited the defendant frequently and had ample opportunity to ascertain her virtues, faults and peculiarities—so far at least as these things are ever visible to a suitor before marriage. In short, they had ample opportunity to become well acquainted with each other and form a fair judgment whether marriage was desirable. Considering their worldly experience and matrimonial trials it is not credible that either believed the other an angel and in this respect it is quite clear that neither was mistaken."

## Correspondence

### THE SUPERANNUATION OF FEDERAL JUDGES.

*To the Editor of* LAW NOTES.

SIR: In the article entitled "The Superannuation of Federal Judges" in LAW NOTES for March, 1917, there occurs a very serious error in the sentence "Gladstone started his famous Midlothian campaign at eighty, overwhelming the Conservative government, and became Premier at eighty-three."

Gladstone's famous Midlothian campaign was begun and ended in 1880, at which time Gladstone was between seventy and seventy-one. He first became Prime Minister twelve years before that time, in 1868.

BROWN & BROWN.

Chamberlain, S. Dak.

"I have seldom found much good result from hypercritical severity, in examining the distinct force of words. Language is essentially defective in precision; more so than those are aware of who are not in the habit of subjecting it to philological analysis." Johnson J., concurring. Martin *v.* Hunter, 1 Wheat. 374.

PATENTS

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WATSON E. COLEMAN,

PATENT LAWYER 624 F Street, N. W., Washington, D. C.

# Law Notes

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### Judicial Prophecy.

THE judges of the appellate courts usually confine themselves to the dry function of passing judgment on past events, but they occasionally indulge obiter in remarks which bear a flavor of prophecy. Their average of successful forecast seems to be about the same as that of other prophets. Thus Judge Hooker won out handily with respect to the suggestion made by him in *Murfin* v. *Plank Road Co.,* 113 Mich. 675, wherein speaking of the liability of a bicycle rider to pay toll, he said: "The use of two wheels instead of four, if propelled by a motor *as they are liable any day to be,*" etc. On the other hand Lord McNaghten in *Winans* v. *Attorney General,* [1904] A. C. 287, failed very signally to glimpse what the future held in store. The issue was as to the status of one Winans, a wealthy American shown by the evidence to have been wholly absorbed in the idea of developing a type of "spindle shaped" or "cigar shaped" vessels which in time of war should "meet vessels in open sea near the European side and destroy one vessel after another so that none of them would be able to reach our shores." Of these designs his Lordship said: "Of course to us these schemes of Mr. Winans appear wild, visionary and chimerical." The recent ravages of the "Chimera" form almost too serious a subject for jest, but the members of a profession compelled to bow to the supposed omniscience of the courts of last resort must seize for their satisfaction on the occasional noddings of Homer.

### The War Power.

THE words of one of the framers of the Constitution, written in a time of peace, have not only an element of authority but a freedom from the excitement of the present moment, which no contemporaneous utterance can enjoy. We quote therefore from Mr. Madison (Federalist, No. 41, p. 191): "Security against foreign danger is one of the primitive objects of civil society. The powers requisite for attaining it must be effectually confided to the federal councils. Is the power of declaring war necessary? . . . The existing confederation established this power in the most ample form. Is the power of raising armies and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defense. But was it necessary to give an indefinite power of raising troops, as well as providing fleets, and of maintaining both in peace as well as war? . . . With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal constitution could chain the ambition or set bounds for the exertions of all other nations, then, indeed, might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety. . . . The means of security can only be regulated by the means and danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulses of self-preservation."

On the other hand, in his argument for the petitioner in *Ex parte Milligan,* 4 Wall. (U. S.) 2, Mr. Black said: "You have heard much, and you will hear more, concerning the natural and inherent right of the government to defend itself without regard to law. This is fallacious. In a despotism the autocrat is unrestricted in the means he may use for the defense of his authority against the opposition of his own subjects or others; and that is what makes him a despot. But in a limited monarchy the prince must confine himself to a legal defense of his government. If he goes beyond that, and commits aggressions on the rights of the people, he breaks the social compact, releases his subjects from all their obligations to him, renders himself liable to be dragged to the block or driven into exile."

The contrast between the two points of view is clear and characteristic. One is the view of the statesman and publicist; the other that of the pure lawyer.

### Naturalization of Alien Enemies.

IN connection with the right to naturalization of persons of German birth resident in the United States an interesting question arises with reference to a German statute relating to expatriation, since a person of German nativity who has become expatriated by absence from the land of his birth may perhaps not be a "native citizen or subject" of Germany within the act forbidding the naturalization of an alien enemy. By the North German Nationality Law of June 1, 1870, extended in 1873 to the whole of the German Empire, Germans who "reside during ten years uninterruptedly in a foreign country thereby lose their citizenship." But the force of that provision is lessened by a further clause for a restoration of citizenship on return to Germany and by the Military Law of May 2, 1874, which provides: "Persons who have left the territory of the empire and have lost their German nationality, but have not acquired another nationality ('Staatsangehörigkeit'), or have lost it again, are bound to present themselves for service in the event of their coming to settle in Germany." In the case of

*Ex p. Weber,* [1916] 1 A. C. 421, the effect of the foregoing provisions of the German law was considered by the British House of Lords with reference to a person of German birth who had resided in England for fifteen years. Holding him to be an alien enemy, it was said by Lord Buckmaster: "It appears that, by an Act of 1874, a man in the exact position of the present applicant, if he returned to Germany for purposes other than a transient visit, would become liable to be called upon to join the military forces of the empire; and, although a limit is imposed in that statute in times of peace within which that right of the state is to be exercised, no such limit exists in times of war. It therefore follows that if the present applicant returned to Germany and did no more than to show that he intended to reside there he would at once become liable to German military law and to be called upon to take his place with the forces in the field. My Lords, that is not the only connection which still subsists between the applicant and the country of his birth. By s. 21 of the Act that was passed in 1870 this man, although he had lost his citizenship by ten years' residence in this country, if he had not acquired another citizenship (and it is not suggested that he has), could have the citizenship of Germany given back to him, even though he remained here, on his mere application, and at the same time by s. 26 of the Act of 1913, if he proved that no blame attached to him, he would be at liberty to apply to the state to which he belonged for renationalization, and they would have no power to refuse. It is therefore quite plain that there still remain attached to this man certain ties by which he is bound to his native country. There are certain obligations that he might be called upon to discharge if he went back to his country; there are certain rights which he is entitled to enjoy if he chooses to remain away. In these circumstances I am unable to see that the applicant has discharged the burden that is cast upon him of showing that he has so completely divested himself of German nationality that he can be treated, for the purposes of this application, as though he no longer remained a German citizen."

**Pacifist Meetings and Free Speech.**

CONSIDERABLE complaint has been made of the action of the police in several of the larger cities since the declaration of war in breaking up public "pacifist" meetings, and the fear has been expressed that the right of free speech has been impaired thereby. The legal profession is vitally interested in free speech (though it is said its members do little free speaking), but their trained powers of discrimination enable them to see that it has not been jeopardized in the present instance. So far as can be judged the principal staple of the meetings in question was violent denunciation of the chief executive and of a policy on which the nation by its accredited representatives has solemnly embarked. It is very clear that this is far from being an exercise of a constitutional right and that it is on the contrary a criminal offense. Sometimes those who clamor most loudly of liberty are those who desire to pervert it to license, as has often been illustrated in the reported cases. Thus in *People* v. *Most,* 128 N. Y. 108, a meeting addressed in violent terms by an anarchist was held to constitute an unlawful assembly. In *People* v. *Burman,* 154 Mich. 150, in sustaining a conviction for disorderly conduct, the court said: "The question here is not whether the defendants have in general a right to parade with a red flag. It is this: Had they such right, when they knew that the natural and inevitable consequence was to create riot and disorder? Defendants knew this red flag was hated by those to whom it was displayed, because it was believed to represent sentiments detestable to every lover of our form of government. They knew that it would excite fears and apprehension, and that by displaying it they would provoke violence and disorder. Their right to display a red flag was subordinate to the right of the public. They had no right to display it when the natural and inevitable consequence was to destroy the public peace and tranquillity. It is idle to say that the public peace and tranquillity was disturbed by the noise and violence, not of defendants, but of those whose sentiments they offended. When defendants deliberately and knowingly offended that sentiment, they were responsible for the consequences which followed, and which they knew would follow."

**War Time Amnesty.**

IT was a custom of European kings in the middle ages to grant in war times an amnesty to such prisoners as would enter the military service. Within limits the idea has yet much to commend it. There are many men now serving in prison who are capable of becoming good citizens. Our parole laws are based on that fact. It would not be amiss for Congress to permit the enlistment of such prisoners as the prison authorities should select as proper subjects for parole. They need discipline to teach them to become good citizens, and military training affords it. They have, by crime, incurred a debt to society, and war gives an opportunity to pay it. It is not impossible that the very qualities of daring and love of adventure which win distinction in the field have brought many men into collision with the law in times of peace. It is recognized that the army is an honorable organization and not a refuge for thugs and ruffians. But the organizations of peaceful industry are equally honorable, and into these we habitually parole prisoners, without providing the disciplinary facilities which the military service affords. The suggestion seems attractive, gaining for the government the service of a number of men who are now "industrial waste" and for the men unequaled opportunity for rehabilitation. It cannot of course be put into effect without Congressional authority, since a statute (Rev. St. § 1118, 7 Fed. St. Ann. 960) provides that "no person who has been convicted of a felony shall be enlisted or mustered into the military service."

**The Lawyer's "Bit."**

THE present mobilization of the industrial forces of the nation seems to find no special function for the legal profession. As individuals the lawyers will do their share. Many of them are now in the training camps. Others in public station have shown their readiness to subordinate partisanship to patriotism. But as a profession, the bar seems without a distinctive place in the war. One suggestion may, however, be proffered. Our constitution and institutions are founded on ideals of peace and are in many ways not adapted to the exigencies of war. It has often been asserted by the exponents of autocracy that a democracy is for that reason impotent in

time of national conflict. In past national crises, notably in the Civil War, a number of cases arose wherein military action of undoubted expediency was resisted in the courts as being violative of the constitutional rights of some individual whose abuse of the privileges of citizenship did not quite transcend limitations fixed in contemplation of a state of peace. In more than one instance judicial orders were made in such a proceeding which would have interfered materially with the prosecution of the war had not a military commander stood on the practical supremacy of his bayonets and refused obedience. In those cases the blame must rest not on the judges whose oaths bound them to declare the law without regard to consequences, but on the attorneys who voluntarily, for a fee, initiated the proceedings. There are to-day very many lawyers who in their practice will refuse a case, however well founded it may be in technical law, if its success means the perpetration of an injustice; who will turn summarily from their office a person seeking to gratify personal rancor by enforcing a small technical right to the serious detriment of a worthy citizen. It is not too much to hope that in this time of national stress every member of the bar will rise to that high ethical level with respect to cases calculated to impede the efforts of our government to prosecute its just war to a victorious conclusion.

### A New Cure for Mobs.

INTER ARMA LEGIS SILENT does not seem to be a maxim of universal application. Recently a mob gathered around a jail in a Virginia city clamoring for the blood of a prisoner confined therein and manifesting a strong disposition to overcome the guards and break in the jail door. The judge of a local court mounted the jail steps, accompanied by his clerk and bailiff, opened court in due form, and announced that any person disturbing the peace in that vicinity would be committed for contempt. The crowd promptly withdrew and the riot was over. Even allowing something for the American sense of humor, the incident affords some scope for reflection. Every man in that mob was guilty of a felony and liable to a penalty more severe than any which could be imposed for contempt, but that did not in the least deter them from their unlawful enterprise. What made the difference? Simply that in the one case the apprehended penalty was certain and immediate, while in the other it existed only in the dim future, beyond a hundred delays and a myriad of possible salvation-working quibbles. The lesson is plain and emphatic. When criminal trials are prompt and businesslike, with technicalities summarily brushed aside, punitive justice will gain immeasurably in its deterrent effect, and penalties can be humanized without detracting from that result.

### Lawyers in Public Office.

IN several recent instances the lay press has shown satisfaction over an alleged modern tendency to prefer business men to lawyers for elective and appointive office, and predicted that more efficient administration of public affairs will result. The sponsors of this view apparently picture the typical lawyer as wholly engrossed in browbeating witnesses and drawing up documents full of involved verbiage. As a matter of fact the lawyer is the highest type of business expert. His most lucrative practice is found in solving by the aid of his broader viewpoint and better trained mind the problems which threaten his clients. The amount of business acumen necessary to advise the parties to a single corporate reorganization would suffice to run a grocery store for a year. Another element also is often lost sight of. A man engaged in commercial business is trained to the single idea of personal profit—a perfectly honorable and legitimate idea but none the less quite foreign to the highest ideals of public service. The lawyer, on the other hand, is trained to service; his most strenuous endeavors are habitually directed to maintain the rights and interests of another. A code of ethics rigidly enforced by the courts teaches him that when his personal interest opposes that of his client he must act with an eye single to the benefit of the latter. Coming into public office it is a natural and easy transition of thought to regard the public as his client, and an application to the relation of officer and public of the fidelity and zeal which is habitual between the attorney and client would produce a public service well nigh ideal. It would be a public misfortune if the services of men trained in the legal profession were not utilized to the fullest possible extent by the public, but it is a misfortune which the discriminating electors of the country will assuredly avert notwithstanding the occasional descendants of Jack Cade who now edit newspapers.

### The Fraudulent Prospectus.

THE trend of recent decisions is most disquieting to those plausible gentry who sow broadcast rose-tinted accounts of the independence if not luxury to be gained from an acre of land in some specially favored spot, and reap a harvest of the dollars of the city-wearied clerk and mechanic. By studiously keeping within the supposed boundaries of the rule that statements of intention and expressions of opinion as to the future do not constitute fraud, these worthies have in most cases managed to avoid legal liability to their dupes. But in *U. S.* v. *New South Farm and Home Co.,* 241 U. S. 64, the circulation through the mails of a prospectus enticingly entitled "Ten Acres and Freedom," promoting the sale of certain Florida lands, was held to constitute an offense under the federal act forbidding the use of the mails in furtherance of an intent to defraud, the court saying: "Mere puffing, indeed, might not be within its meaning (of this, however, no opinion need be expressed), that is, the mere exaggeration of the qualities which the article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has, but invents advantages and falsely asserts their existence, he transcends the limits of 'puffing' and engages in false representations and pretenses. An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false they become the scheme or artifice which the statute denounces." In *Moffatt* v. *U. S.,* 232 Fed. 522, a conviction under the same statute based on a circular advertising certain oil wells was sustained. In the same volume (*Samuel* v. *U. S.,* 232 Fed. 536) a circular

advertising a medicinal compound was held to be within the terms of the statute. In *Wilson* v. *U. S.*, 190 Fed. 427, the court said: "The purpose of the statute was the broad one of preventing the use of the mails to despoil the public, whether such result was intended to be accomplished by means of plain falsehoods or by the most glittering, alluring and complicated contrivances." Between the doctrine of these cases, the "Blue Sky Laws" whose validity is now established, and the recent state statutes regulating advertising (see Ann. Cas. 1916A 900), the business of catering to the supposed desire of the American people to be humbugged is becoming somewhat perilous.

**Torrens Laws.**

THE so-called Torrens system of title registration has been adopted by many foreign nations, and by some fourteen American states, and is under consideration in many others. While the system has been subjected to many and forcible attacks, the objections urged against it do not seem of sufficient weight to offset the advantages of a system which puts real estate titles on an unimpeachable basis and permits their transfer without the delay and expense of searching records, obtaining affidavits that some remote grantor was at the time of his deed unmarried, and the like. The system has several times received the indorsement of the American Bar Association, and was strongly supported in a report of the New York Bureau of Municipal Research some two years ago. One practical difficulty has however attended its operation. The registration of a title is in a sense a service to posterity, since the expense of registration exceeds that of searching the title for a single transfer, which is the extent of the owner's interest. Accordingly, but few landowners take advantage of the registration law. In Illinois a recent statute seems to present a solution of the problem, by requiring every executor or administrator to register the lands of his decedent as a part of the administration thereon. That act will obviously bring practically all land in the state under the Torrens system in a single generation. The validity of the statute has not been passed on, but the validity of the Torrens Laws being established, the enforced registration of decedents' lands would seem to present no constitutional difficulty. The right to inherit lands is not a natural one; it is not even a common-law right, but had its origin in the Statute of Distributions (22 and 23 Car. II, c. 10) and exists in the United States by virtue of statutes patterned after that act. Prior to that time the estates of decedents went to the bishop or ordinary to be appropriated to pious uses, and even that disposition was said to rest in the pleasure of the King. (2 Bl. Com. 494; Hensloe's case, 9 Coke 37.) That the legislature may impose restrictions looking to the repose of property rights on a privilege existing wholly by legislative sanction would seem to be undeniable. It is on this consideration that the validity of succession taxes has been sustained. See *In re McKennin's Estate,* 27 S. Dak. 136, Ann. Cas. 1913D 745. Compare *Nunnemacher* v. *State,* 129 Wis. 190, 9 Ann. Cas. 711.

**Election or Appointment of Judges.**

BETWEEN the popular distrust of appointments on the one hand and the growing realization that the voting majority are very poor judges of judicial timber on the other, the mode of selecting the incumbents of judicial offices is continually agitated. Professor Brown of the University of Pennsylvania Law School said in a recent address:

"In the very nature of things the people are not qualified to decide who should serve on the bench. That decision should be made by the highest executive authority—to wit, the governor of the state. This principle is in force in the federal courts, and, on the whole, with distinctly desirable results."

From the opposite viewpoint, a state senator in Oklahoma has recently introduced a resolution calling for the election of United States judges. After reciting a number of alleged evils the resolution concludes:

"We, therefore, declare that the true remedy is for the people, by proper amendment to the Federal Constitution, to take the selection of the members of the Supreme Court into their own hands as they did the selection of United States senators, and as they ought to do more completely in the selection of the President."

Among those who are committed to the elective system there is considerable agitation for reforms designed to obviate party influences. In Minnesota a bill has been introduced providing for a separate nonpartisan convention to nominate candidates for the supreme bench. Per contra, in Pennsylvania a measure has been introduced abolishing the nonpartisan judicial ballot and reverting to the former system. Finally in Iowa there has been a suggestion, apparently with jocular intent, that the judicial term should be reduced to six months to give every lawyer a chance at the position. Amid this diversity of views a plan which will give general satisfaction may ultimately be found, but it has not yet come to light.

**Pronouncing Sentence.**

WITH the steady growth in favor of the theory that the primary purpose of criminal jurisprudence is the reformation of the offender, there arises a question as to the fitness of the judges to fix the sentence to be imposed. Under the ancient punitive theory, the only question was as to the existence of mitigating circumstances in the crime itself, and as to that no one was better fitted to decide than the judge who heard the case. The later view, which recognized as the chief purpose of punishment the deterring of others from crime, did not change the matter much.

But on the reformation theory an entirely new group of considerations enters into the problem. According to that view, the question is not one of the crime and its incidents, but of the individual and his antecedents. These the trial does not disclose; they must be sought by an independent investigation which the trial judge has neither the time nor the training to undertake. If it was a matter of curing a sick man, no one would think of having a lawyer summon a few doctors of different schools, hear their conflicting views, and then write out a prescription, and no analogous method will suffice for the cure of the morally afflicted. Guilt or innocence is a judicial issue, to be tried in a judicial manner. But acceptance of the reformative theory of punishment makes the sentence a question for a specially trained expert in criminology and social science. The idea is admittedly a radical one; it will come, if at all, only after a series of experimental

approximations. But it seems none the less to be supported by convincing logic. It will, as an incident, accomplish an additional benefit in producing a more fitting atmosphere for the sentence, which now, coming at the end of the heated conflict of the trial, in which the trial judge necessarily took a prominent part, must often assume to some a vindictive appearance ill suited to the administration of justice.

**Varied Judicial Duties.**

THE suggestion that the burden of specialized research contemplated by reformative criminology should be imposed elsewhere than on the trial judges does not overlook the wide range of the functions which those judges have hitherto exercised. Through receivers they have superintended the operation of transcontinental railroads. In admiralty they have passed in review the acts of experienced captains in the most desperate situations of maritime peril. In patent cases they have been compelled to educate themselves in the most intricate and technical sciences and decide where the nation's foremost experts disagreed. They have entered the most intimate realms of domesticity, and, sometimes despite the handicap of personal bachelorhood, have apportioned carefully between husband, wife and mother-in-law the blame for marital disaster. They have weighed in the judicial scales the eligibility of a suitor for the hand of a ward in chancery. An interesting illustration comes to hand in an application said to have been made recently by the guardian of an incompetent in Chicago for the direction of the court with respect to consenting to a surgical operation on the ward. The court heard the views of the physicians as to the necessity of the operation and its attendant dangers, and directed that it should be performed. The law touches on human life at every stage; it attends at the birth to determine parentage and legitimacy, and accompanies the corpse to the churchyard to enforce decent interment. It is the one science which admits of no specialization; whose perfect administration demands nothing short of omniscience. That there is criticism among the unthinking is not remarkable; that so little criticism is justified speaks volumes for the legal profession.

## WHAT IS NEGLIGENCE?

*Negligence of Plaintiff as a Defense.*

How many lawyers, after a study of the cases, can say that they have a real understanding of the doctrine of Contributory Negligence, the Turntable doctrine, the doctrine of the Last Clear Chance, or the doctrine of assumption of Risk? These "doctrines" of the law are invoked in the decision of hundreds of cases every year, and a knowledge of what they mean is of the greatest importance to the practitioner, and yet who can say that he is able to reconcile and explain the language of the opinions? The judges themselves, in occasional candid expressions, have said that explanation is impossible.

In the course of a particularly lucid opinion Mr. Chief Justice Shepherd of the North Carolina court said: "Looseness of language and dicta in judicial opinions, either silently acquiesced in or perpetuated by inadvertent repetition, often insidiously exert their influence until they result in confusing the application of the law or themselves become crystallized into a kind of authority which the courts, without reference to true principle, are constrained to follow. These observations are particularly applicable to the doctrine of contributory negligence and especially in its relation to what is generally called the rule of *Davies* v. *Mann*. All along the highway of judicial decision we find it so strewn with the wrecks of overruled cases, exploded dicta and condemned or qualified expressions that we are inclined to sympathize with the despairing remarks of Judge Thompson that 'the whole subject of contributory negligence remains in a state of great confusion and uncertainty.'" *Smith* v. *Norfolk, etc. R. Co.* 114 N. C. 749, 19 S. E. 863, 923, 25 L. R. A. 287.

It is not true, however, that the situation of the "doctrines" in question is hopeless of explanation and elucidation; and the writer purposes to expound a theory that will not only give an understanding of those "doctrines," but will furnish a reconciliation of most if not all of the apparent conflicts among the cases decided thereunder. At some subsequent time the Turntable doctrine and the doctrine of the Last Clear Chance will be considered. Those "doctrines" have furnished, as observed by Judges Thompson and Shepherd in the passage quoted above, the principal subjects of confusion and uncertainty in the opinions. At present, however, it is important to get at the concept embodied in the expression "contributory negligence."

When pressed for an explanation of what constitutes contributory negligence, the courts observe that contributory negligence is a failure to exercise care, and let it go at that. But what is this duty of care? And when and why does it arise? A plain answer to these questions is to be found in the decisions—a number of which are referred to hereinafter—but for some unaccountable reason it appears to have gone unnoticed.

What was the plaintiff's duty to exercise care, that by reason of its nonobservance caused his injury? Every one knows that he was bound to look and listen. This was his duty of care, and if he neglected it he must be deemed to have been guilty of contributory negligence. Again, maybe he did look and listen; he saw the train coming toward the crossing; but instead of stopping he "stepped on it" and tried to cross ahead of the train. The duty here was to stop, after having ascertained the approach of the train. And a breach of this duty also was contributory negligence. Here, then, we have two duties of care, one consisting of measures to ascertain danger and the other consisting of measures for the avoidance of danger after it has been ascertained. The term "contributory negligence" is indiscriminately applied, however, to the breach of both of these duties, and to this is attributable much of the uncertainty and confusion by which the subject is clouded.

It was suggested in a previous number of LAW NOTES (20 L. N. 185; January, 1917) that a handy formula for expressing the thought or idea embodied in the term "negligence," was "action or nonaction accompanied by knowledge of the consequences thereof." And this formula applies equally in describing contributory negligence. Whether the negligence is that of the plaintiff or of the defendant, it is equally "action or nonaction accompanied by knowledge of the consequences thereof." The

plaintiff, with knowledge of the danger, either did or did not do something that brought him into contact with the dangerous instrumentality. A reference to a few of the decisions will disclose the truth of the writer's theory.

Very often the courts have observed that if the plaintiff had no knowledge of the danger he will not be held guilty of contributory negligence. *Hobbs* v. *Blanchard & Sons Co.*, 74 N. H. 116, 65 Atl. 382, 124 A. S. R. 944; *Henderson* v. *O'Haloran*, 114 Ky. 186, 70 S. W. 662, 102 A. S. R. 279, 59 L. R. A. 718; *Standard Oil Co.* v. *Tierney*, 92 Ky. 367, 17 S. W. 1025, 36 A. S. R. 595, 14 L. R. A. 677; *Griffin* v. *United Electric Light Co.*, 164 Mass. 492, 41 N. E. 675, 49 A. S. R. 477, 32 L. R. A. 400. For example, a headnote reads as follows: "A thirteen-year-old boy cannot be said to be negligent as a matter of law in attempting to pry a cap off a dynamite stick, which causes an explosion, to his injury, where there is nothing to show that he had any knowledge that such a proceeding would cause an explosion." *Olson* v. *Gill Home Investment Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884. Another asserts that "a woman is not negligent in failing to see the danger of her child who is playing in the yard near a window at which she is sitting, because of the possible giving way of the cover of a concealed cesspool, of the existence of which she is ignorant." *Mesher* v. *Osborne*, 75 Wash. 439, 134 Pac. 1092, 49 L. R. A. (N. S.) 917. And still another syllabus holds that "a trespasser upon premises who does not know of the presence of an unnecessary hidden danger thereon, and is in no fault for not knowing of such presence, need not conduct himself as though he was informed of the danger, to relieve himself of a charge of contributory negligence." *Hobbs* v. *Blanchard & Sons*, 74 N. H. 116, 65 Atl. 382, 124 A. S. R. 944. It has also been observed judicially that "a person is not negligent in failing to provide against what could not have been reasonably expected, much less against a danger that he is warranted in assuming does not exist." *Russell* v. *Town of Monroe*, 116 N. C. 720, 21 S. E. 550, 47 A. S. R. 823.

In *Allen* v. *Boston*, 159 Mass. 324, 34 N. E. 519, 38 A. S. R. 423, it appeared that sewage leaked through a cellar wall and caused the damage complained of. It was contended that the wall should have been built so as to keep out sewage, and hence that a recovery was barred by contributory negligence. The court said of the lot owner that "due care on his part did not require him to guard against a defective construction of the sewer, the existence of which he had no reason to suspect." As the A. S. R. headnoter put it, the "owner of a lot is not negligent in not building a cellar wall so as to keep out sewage when he has no knowledge that the sewer will leak." So it is asserted that "when the defense of contributory negligence is urged as a ground for a nonsuit or a verdict for the defendant, it must appear that reasonable men, acting as the triers of the fact, would find, without any reasonable probability of differing in their views, either that the plaintiff knew and appreciated the danger, or that ordinarily prudent men under the same circumstances would readily acquire such knowledge and appreciation." *Gentzkow* v. *Portland R. Co.*, 54 Ore. 114, 102 Pac. 614, 135 A. S. R. 821, quoting Mr. Justice Walker's observations in *Stevens v. United G. & E. Co.*, 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119.

On the other hand, if the plaintiff acted with a knowledge of the danger he will be barred of recovery. *Bahel* v. *Manning*, 112 Mich. 24, 70 N. W. 327, 67 A. S. R. 381, 36 L. R. A. 523; *Johnston* v. *New Omaha, etc. Electric Light Co.*, 78 Neb. 24, 110 N. W. 711, 113 N. W. 526, 17 L. R. A. (N. S.) 435; *Schwenk* v. *Kehler*, 122 Pa. St. 67, 15 Atl. 694, 9 A. S. R. 70. A commentator in the Lawyer's Reports Annotated states the rule as follows: "If the danger is known and can be avoided, a peril voluntarily and unnecessarily assumed may constitute such contributory negligence as would preclude a recovery." Note, 12 L. R. A. 282. Again, "the rule of law, briefly stated, is this: One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure." *Fitzgerald* v. *Connecticut River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 A. S. R. 537. And it has been judicially noted that "where there is danger, and the peril is known, whoever encounters it voluntarily and unnecessarily cannot be regarded as exercising ordinary prudence, and therefore does so at his own risk." *Gosport* v. *Evans*, 112 Ind. 133, 13 N. E. 256, 2 A. S. R. 164, quoting *Corlett* v. *Leavenworth*, 27 Kan. 673. So it has been held that "no action against a town to recover for injuries occasioned by falling upon the ice on a dangerous sidewalk can be sustained by one who knows it to be dangerous, by means of ice upon it, and who voluntarily attempts to pass over it, though the town is bound to keep the way in repair." *Wilson* v. *City of Charlestown*, 8 Allen (Mass.) 137, 85 Am. Dec. 693.

In *Horton* v. *Inhabitants of Ipswich*, 12 Cush. (Mass.) 488, the court said: "The real point is not whether the plaintiff was chargeable with any negligence in making his way over the road, after he had entered upon it, but whether he knew, or had reason to believe, that the road was dangerous when he entered on it, or before he reached any dangerous place. If so, he could not, in the exercise of ordinary prudence, proceed and take his chance, and if he should actually sustain damage, look to the town for indemnity." *Town of Gosport* v. *Evans*, 112 Ind. 133, 13 N. E. 256, 2 A. S. R. 164. The headnote to *Pittsburgh, etc., R. Co.* v. *Collins*, 87 Pa. St. 405, 30 Am. Rep. 371, reads as follows: "A person who, without right, with a full knowledge of the location, voluntarily places himself upon railroad track, at a place where there is no crossing, and which is a known place of danger, and is killed by a passing train, is negligent, and no damages can be recovered for his death, except for wanton injury. Another headnote holds that "one who sits within range of a gun when he knows that it is cocked and that another is about to pull the trigger, and fails to protest or get out of range, although having time to do so, is guilty of contributory negligence precluding a recovery in case he is injured by the discharge of the gun." *Bahel* v. *Manning*, 112 Mich. 24, 70 N. W. 327, 67 A. S. R. 381, 36 L. R. A. 523. This array of authority ought to convince anyone of the truth of the assertion that negligence or contributory negligence consists in "action or nonaction accompanied by knowledge of consequences" of such action or nonaction. But if any reader should remain skeptical, he can readily find hundreds of opinions of like import.

The distinct duties of knowing and acting, then,—which we express by the formula of "action accompanied by knowledge"—were imposed on both the defendant and

the plaintiff. The defendant was bound to take measures to discover the danger; and after its discovery he was under an obligation to act so as to avoid injuring the plaintiff. And, likewise, the plaintiff was in duty bound to inform himself of the peril, and after acquiring information thereof to take steps to avoid injury to himself. If a plaintiff can show a breach of these duties on the part of a defendant, he makes out a case authorizing a recovery. And if the defendant can show a neglect of these duties by the plaintiff, the right of recovery is defeated. A good illustration of the truth of this proposition is found in a headnote (A. S. R.) to *Borden* v. *Daisy Roller Mill Co.*, 98 Wis. 407, 67 A. S. R. 815, which reads as follows: "If it is negligent for the owner of a mill to have a ladder without any spikes in the bottom to prevent its slipping, it is equally negligent for a person experienced in the use of ladders under such circumstances, and having an ample opportunity to discover the condition of the ladder, to use it without making any test or inspection, and for his injury due to his negligence in this respect he cannot recover." This opposing of duty to duty, or offsetting a breach of duty on the part of the defendant by a breach of duty on the part of the plaintiff, finds its fullest expression in the doctrine of the Last Clear Chance. A failure to distinguish these duties of *knowing* and *acting* has given rise to most of the confusion with respect to that doctrine.

*Violation of Statute.*

It is interesting to apply the principle under consideration to cases of injury alleged to be due to violations of statute. As is well known there has long raged a violent controversy as to whether contributory negligence constitutes a good and sufficient defense to an action based on a violation by the defendant of an express statutory enactment. Some courts stoutly have asserted that the defense is available, whereas others just as firmly declare that it is not to be considered. No one seems to have attempted to reconcile these apparently divergent views. If, however, one bears in mind that the criterion of liability is the relative knowledge of the parties respecting the peril from which injury flowed, and that knowledge may be actual or imputed, a plausible reconciliation of the cases presents itself. Thus, if it appears that the plaintiff had actual knowledge of the defendant's infraction of law, it is difficult to see why this should not be considered a complete defense to the suit; whereas in the class of cases wherein knowledge on the plaintiff's part is merely imputed from the fact that he did not exercise his intelligence and senses to discover the peril, it would seem that a recovery might well be allowed. The defendant has actual knowledge of his own violation of the law, and nothing less than actual knowledge on the part of the plaintiff should be held to put the parties on equal footing and to render them equally responsible for the ensuing injury. BERKELEY DAVIDS.

Washington, D. C.

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"Nothing is better settled in legal decisions than the doctrine that war puts an end at once to all dealing and all communication of the citizens of one belligerent country with those of the other belligerent country, and that it places every individual of the respective governments, as well as the governments themselves, in a state of hostility." Clifford, J., Burbank *v.* Conrad, 96 U. S. 305.

## IMPROBABLE TALES BY BANKRUPTS.

THE pinch of poverty and the sordid shadow of pecuniary need, debtors' prisons and bankruptcy courts, constitute a considerable part of the matter of modern fiction. Dickens, *par excellence*, and many others have found much of human comedy and tragedy squeezed out of life by the duress of material circumstance. Bankruptcy itself may be said to have become a stock stage property of the novelist. One acquainted with bankruptcy courts, proceedings, and cases knows, however, that fiction plays perhaps a larger part in bankruptcy than bankruptcy does in fiction. An experience in insolvency might seem a whimsical suggestion as a schooling for novelists, though many of them have, *ex necessitate rei*, had such a schooling. But necessity, it would seem, is the mother of inventiveness as well as of invention. By the compensating efficacy of some occult law, the losses a man suffers through material insolvency seem to be atoned for by the spiritual gain of a sudden accession of resplendent powers of the imagination. If one is fain to write fiction, if he aspires to ride winged Pegasus to the high hill Helicon, there to quaff from the hoof-wrought spring "the true, the blushful Hippocrene," the intoxicating mead of imaginative inspiration, let him first file a voluntary petition in bankruptcy.

For, if truth is stranger than fiction, the testimony of bankrupts in court proceedings often goes truth itself one better. A bankrupt, under an order directing him to pay over assets to the trustees, or in contempt proceedings against him for failure to turn over assets when ordered, or when specifications are filed by creditors in opposition to his application for discharge, will frequently adduce a story which, for ingenuity of invention and splendor of imagination, would put H. G. Wells to shame, would out-verne Jules Verne at his best, and would cause the dust of Baron Munchausen and of Marco Polo to writhe in the grave in envy.

There is a strong probative force in improbability. As the court remarked in the case of In re Leslie, 119 Fed. 406, 408, "a witness may be as thoroughly discredited by the inherent improbabilities of his testimony as by the direct testimony of witnesses." And in bankruptcy cases the courts have frequently allowed the probative force to puncture the opalescent bubble blown by the witness's imagination, rejecting, as too inherently improbable to be worthy of credence, a bankrupt's story on the stand in explanation of his disposition of money, of an apparent deficiency in funds, or of his failure to turn over assets. Some of these stories, to be found in numbers in the volumes of the federal court reports, will be considered here, more with an eye to their interest as fiction than to their importance in law.

Perhaps the lowest order of bankrupt fiction is that employed by the simpler devotee and less able exponent of that fine art, who affects an incredible ignorance of his own business affairs and answers "I don't know" to every question. A good example of this dodge is to be found in the case of In re Schlesinger, 97 Fed. 930, wherein it appeared that about $12,000 came into the hands of the bankrupt during the seven or eight months preceding the filing of the petition and was in no way satisfactorily accounted for, and that in the same time he had deposited over $24,000, all of which was checked out three days before the petition was filed. At the trial he could produce no accounts, nor returned checks. No other explanation could be extracted from him than "I don't know," or "I don't remember." "The ignorance he professed in regard to the disposition of his money is almost incredible," said the court. "I cannot regard his testimony on this subject as other than a tissue of perjuries." The most striking *ignoramus* testimony by a bankrupt is to be found in the

case of In Re Alphin & L. Cotton Co., 134 Fed. 477, wherein it appeared that the practical owner and absolute controller of a cotton company, after the prosecution of a most ingenious scheme for the cashing of drafts on the security of fraudulent warehouse receipts for nonexistent cotton, by which scheme his company handled nearly two million dollars in less than five months, invented the pretty fiction that he had no recollection of any of the transactions.

A bankrupt often develops a sudden devotion to his wife, and a singular and unselfish interest in her sole and separate estate. This interest leads him to invent pleasing fictions to the effect that money or other property traced to him is not his but belongs to his wife. An instance is In re Herrman, 136 Fed. 767, 69 C. C. A. 413. The good wife in that case had brought to the marriage a modest dowry of $10,000. Her husband conducted, in the names of his wife and his brother, a business which was so enormously successful that its profits, invested in real estate, amounted to about a million dollars. After an extravagant course of living, he became involved in difficulties with creditors and filed a petition in bankruptcy. Then, when the creditors earnestly desired information as to the whereabouts of the million, the bankrupt's story was that he owned not a cent of the business, but that it was owned by his wife and brother, each having contributed equally to it. Even in fiction a million dollars is a good average realization on an initial outlay of $20,000.

In an excess of literary enthusiasm, it is difficult for a bankrupt not to let his imagination get astride his intellect. He often fails to observe the unities and to achieve verisimilitude. One of these *literati* invented the story that he owed a debt of $3,000 to his sister for certain divers sums of $50 to $100 loaned to him, a touching story of sisterly affection, until shot through with the chill light of facts. It was proved that the sister was a girl of 18 or 20 years of age, that she had no property and no income or earnings. He might have owed her a debt of gratitude but hardly of $3,000. The court said: "I must withhold discharge in this case. The bankrupt's testimony presents so improbable a story, and is so destitute of any corroborating circumstance whatever, that I cannot resist the conviction that the alleged debt of $3,000 for moneys loaned by the sister is largely if not wholly fictitious." See In re Heyman, 104 Fed. 677.

Another story of mythical debts invented to conceal assets was exploded by a critical court in the case of In re Leinweber, 128 Fed. 641. In that case the court said: "The creditors contend that upon the evidence, taken as a whole and critically examined, it was evident that the names [Hurst, Smith, Wertzel, etc., creditors] given were those of mythical characters, or, at best, of existing characters to whom was attributed a part in a mythical transaction. Divers efforts were made to compel the bankrupt to corroborate his story by producing the alleged payees, with their statements of such facts as would naturally be in their possession. The referee gave him unusual opportunities to raise a reasonable doubt, but he failed to do so. At a meeting in New Haven, the bankrupt finally produced one man, said to be James Hurst, and another who was expected to remove the mystery which surrounded Smith. But just as the performance was about to begin, both witnesses vanished into thin air, and after exhaustive search they were not located, and the mystery remained, and still remains, as impenetrable as ever. Wertzel was a Meriden man, and the bankrupt succeeded in producing him, and it would seem that his testimony must have mollified the creditors, since the amount now ordered to be paid does not include the $500 which the bankrupt testified he had paid to him. In these circumstances the referee issued the order which I am asked to review. I have examined the testimony with care. The circumstances surrounding the alleged payments, when aggregated, fall little short of producing an irresistible inference that the bankrupt did not tell the truth. If there were room for a reasonable doubt to creep in, the creditors ought not to ask the court to apply the rack and thumbscrew, or to experiment upon the bankrupt; but the action of the referee was from every possible viewpoint quite appropriate and laudable. I am satisfied, beyond a reasonable doubt, that on the date of the order the bankrupt had in his possession, or under his control, the moneys which he was ordered to pay over to the trustee, and, as I understand my duty, I must sustain and approve the order."

An interesting narrative of the purchase of smuggled diamonds, on credit, without security, told in order to establish a debt in explanation of a deficiency of over $18,000, failed to carry conviction to the court in the case of In re Weinreb, 146 Fed. 243. The court expressed its incredulity in these terms: "On their first examination, when asked as to what had been done with this $18,200 drawn in cash, each of them refused to answer, on the ground that the answer would tend to incriminate and degrade them. Several months later they applied for a discharge, and one of the specifications of objection to discharge was that they had refused to answer material questions. Thereupon the bankrupts appeared before the referee and offered to answer the questions which they had previously refused to answer, and they thereupon testified, in substance, as follows: That Merker, when in Paris, in May or June, 1902, was introduced to a man named Freundlich, by a diamond broker. He does not remember the name of the broker. He does not know the residence, business address or first name of Freundlich. Freundlich told Merker that he would like to do business with him. Merker said that he would buy if the goods were right and reasonable. Freundlich said that he would send a man to him in New York with the goods, and in the package he would find a memorandum of prices. Freundlich said that he sold goods only for cash, that he didn't want any note or receipt, and didn't want his name entered in the bankrupt's books. Merker explained that they were not able to pay cash, and Freundlich thereupon agreed to sell on eight months' credit. Thereafter in the fall of 1902, a man came to the bankrupt's office. He said that his name was Jackson. The bankrupts did not know where he lived, or where his place of business was, or what his first name was. He brought some diamonds, and said that he represented Mr. Freundlich. The diamonds had enclosed with them a memorandum stating their weight and value. The memorandum had no billhead. The bankrupts purchased the diamonds on eight months' credit. They gave no receipt, note, or writing of any kind for them. They made no entry of them in their regular books, but say they made an entry in a little book like a bank book, which the receiver did not find and which has never been produced. At the expiration of the eight months, which happened to be during the latter part of July, immediately before the bankruptcy, Jackson appeared at the office and asked to be paid. He objected to checks and wanted cash, and thereupon both bankrupts drew the checks in question and went to the bank and drew the cash and gave it to Jackson. Jackson gave them no receipt or paper of any kind. One of the bankrupts admitted that he suspected that these goods had been smuggled, and their claim is substantially that that fact was the explanation of the circumstances under which these goods were bought and paid for. This story is extremely improbable. Of course, smuggled goods may be purchased, and, if purchased, the acts of the parties engaged in such a business are frequently stealthy and

furtive. But if that is the explanation of the circumstances of this purchase, it is not enough for the bankrupts to simply say so. Their story, if true, could be corroborated in various ways. But it is entirely uncorroborated. It is precisely the kind of story which bankrupts would tell who had been engaged in the diamond business and had been planning a fraudulent bankruptcy, and had drawn $18,000 in cash just before their bankruptcy, for the purpose of concealing it from their creditors. I cannot avoid the conclusion that their story is an entire fabrication, and that the bankrupts have this money concealed from their creditors, and that they should be ordered to pay it to the trustee."

The story, told by a man of horseracing tastes, that $3,000 traced to him had been invested in motor boats, has been held to be too palpable a fiction for the court to accept, especially since the local color and atmosphere of the race track pervaded the whole story, the person through whom the purchase of boats was claimed to have been made being a gentleman of Sheepshead Bay. See In re Vyse, 220 Fed. 727. The court gave the following criticism of the technique of this short story: "As to the $3,000, it seems that the bankrupt Vyse, during the days in which he was gambling extensively, says that he turned over to one Kirby, of Sheepshead Bay, $1,700, and then $1,300, within a few days of each other, only a short time before bankruptcy, and only a week before he consulted a lawyer with reference thereto. The ostensible reason for turning the money over was that this man Kirby might invest in some motor boats which were to be sold at a bargain. But there is no satisfactory evidence upon the part of either the bankrupt or Kirby that this reason was then advanced seriously by Kirby, or taken seriously by the bankrupt. In fact all the indications are that the money was given to Kirby for some kind of gambling outlay, or else to conceal it for the bankrupt, and some of it was used by him in gambling upon horse racing and promptly lost. The bankrupt and Kirby now wish the court to believe that the bankrupt placed credence in Kirby's proposition that he could make a valuable investment in motor boats, and then within a few days thereafter made another loan for the same purpose, without inquiring as to the result of the first loan. For these amounts, however, Kirby actually gave the bankrupt a promissory note, and the trustee actually started suit in the state court upon this promissory note, but immediately withdrew the action and changed to this proceeding, in which it is alleged that this promissory note is but a cover to protect the bankrupt in securing for his own purposes the $3,000 which he says he loaned to Kirby. Some elements of the story are inherently preposterous."

The classic among the works of bankrupt fiction is to be found in the case of In re Frankfort, 144 Fed. 721, a story which might be "put over" by some Chaplin of the cinema, or which might have formed the major incident of some Plantine comedy, but which lacks verisimilitude in a court and in the gloom of a law book. The substance of that story was that over $6,000 in bills and checks, being carried by the bankrupt's wife in a large satchel, was lost by the satchel's falling from the handle, the wife strolling on down the street looking in the bargain windows, clutching the unweighted handle without noticing the loss. This is the way the court outlined the story and criticised it: "Mrs. Frankfort testified that she took the satchel containing the money and the checks and went to the various banks to have the checks certified or cashed, and was unable, on account of her not being known at those banks, to accomplish this object. She then went to the Borough Bank, and there the cashier told her that she could deposit the checks and then draw a check against the amount of the deposited checks which the bank would honor and pay to her in cash. To get the check she had to go back to the store, and so, with the satchel and the money, she went back to the store, had her husband sign the check, and then she came back again to the Borough Bank, presented the check, and the money, two thousand and odd dollars, was paid to her in cash which she put into this satchel, together with the $4,000 already in it. She further testifies that she went to several banks in the neighborhood and changed some of this money so that she had twenty-one $100 bills and the rest of the $6,000 in smaller bills, with the exception of about $50.10 in silver. She then started back to the store, but, as she says, thought that she would go down Fulton street and look in at the shop windows and see the bargains, and that this shopping excursion lasted from a half an hour to an hour. She said she carried the satchel lightly in her left hand, and that it was quite heavy to carry. Having carried it along Fulton street, and looked at the bargains and the shop windows, she then made up her mind that she would go home, and coming to the corner of Smith and Fulton streets, where she was to take the car, she looked down to open the bag to get ten cents for her carfare when she found that she had only the handle of the satchel in her hand, and that the body of it was gone. She says that some time before, when she was looking in at Matthews' window on Fulton street, she had felt the satchel lighter, but that she did not look down to see the reason for this, and, in fact, she hadn't looked down at the bag from the time she left the Borough Bank until, wishing to open it, she found that it was gone; that she had not felt anyone grab it, or attempt to take it away from her; and that, in fact, nothing unusual had occurred while she was on her shopping expedition, so far as the bag was concerned; that then, without making any outcry, without retracing her steps, without notifying the police, she threw the handle into the street and walked home weeping. When she arrived at home she told her husband that she had lost the money, but she didn't tell him how, the circumstances of it, and he didn't ask her. He told her not to say anything about it, not to tell anybody anything about it; and she even testified that her brother-in-law, David Frankfort, who was in the employ of her husband, didn't know anything about the loss until he heard the story of it as she told it in court. She also testified that after she came home and told her husband of this loss that he sent her again to the Borough Bank for the purpose of withdrawing one of the checks which had been deposited, and that even then she did not tell any one at the Borough Bank that she had lost this $6,000. The bankrupt says that he didn't tell anybody of this loss; that he didn't notify the police; that he didn't advertise for it; in fact, that he made no effort whatsoever to recover the money. That he went over that afternoon to the market in New York, and saw some parties with whom he was in the habit of dealing, but that he said nothing to them about this loss. I think the story of both the bankrupt and his wife is false, and that the money was not lost as they say it was. It is beyond belief that this woman should have lost the money as she did; that she could have walked the street holding the handle only for so long a time, and not have missed it; and it seems to me that this was a bald conspiracy, hatched up between the husband and wife to defraud the creditors of this amount of money."

The mystery story is a prime favorite with the bankrupt, robbery being the usual plot. This kind of story has many advantages. In the first place, to speak in paradox, robberies are usually unusual. They are strange, and not strictly in accord with the probabilities. A supposed robbery is not easily susceptible of disproof, and, as used as a dodge by a bankrupt, has the inestimable advantage of "passing the buck," shifting the *onus*, to the absent robber, to prove how he committed the al-

leged act under suspicious or improbable circumstances. However the robber mystery has not always proved a safe refuge from the order to pay assets to the trustee. One man claimed that he had carried $1,500 in cash in his pocket for two or three weeks and that he was robbed of it on an Eighth Avenue car, returning from Coney Island. The court said that, although possible in itself, the story was not to be believed, in view of contradictory testimony as to other improbable circumstances. In re McCormick, 97 Fed. 566.

Another robbery fiction artist was weak on technique, omitting many of the time-worn details which no self-respecting robber would have allowed to be lacking in his execution, and seeking to introduce a novel method of housebreaking which the conservatism of the court felt compelled to reject. See In re Gottardi, 114 Fed. 328, wherein the court said: "On this issue of the alleged robbery, as on the one already disposed of, the referee's finding is fully justified by the evidence. There is no room for controversy but that the bankrupts accumulated the large amount of money, of which they claim they were robbed, for the purpose of in some way concealing it from their creditors. This and the other facts enumerated by the referee are sufficient to determine said issue against the bankrupts. Furthermore, the immediate circumstances of the alleged robbery confirm its improbability. Forcible means were not employed in opening the safe. Neither drill nor explosive was used. The safe was opened by some one familiar with the combination, or else the combination was not turned on the night of the robbery. There was no indication of a forcible entry into the house, other than an auger hole through the back door, designed, apparently, to reach a bolt which fastened the door; and this hole was so located with reference to the bolt and a defective and unused lock as to show that the hole was bored by one who knew of the situation and use of the bolt, as well as the disuse of the lock. To my mind, the boring of this hole was a mere artifice on the part of the bankrupts to divert suspicion from themselves. Upon the competent evidence in the record, there can be no reasonable doubt but that there was on the part of the bankrupts a deliberate scheme to defraud their creditors, and that . . . the alleged robbery was fictitious, and part of said scheme."

Exactly the same weaknesses were pointed out in the story of another tyro novelist, who claimed that between seven and eight thousand dollars in bills had been deposited in an insecure wooden desk in a public store, left unguarded two nights, and stolen by a burglar. Barton Bros. *v.* Texas Produce Co., 136 Fed. 355, 39 C. C. A. 181. The court said: "William P. Barton, Jr., claims to have left the store the evening before the alleged burglary, and gone to his home, where he remained all night. The other two brothers were in the store after he left, and were in there when the principal clerk left. All the doors to the store room were securely fastened from the inside, except the front door, which was locked from the outside. On the following Sunday morning the loss of this money was proclaimed by William P. and Ross Barton, and when third parties reached the store the back door was open, and a window in the rear of the building was shown to be raised, and there was a goods box on the outside, below this window, to indicate that the entrance to the building might have been effected through said window. But the presence of a layer of dust on the sill of the window, and cobwebs on the inside thereof, undisturbed, disproved the entry of any person through the window. The physical condition of the desk just after the loss of the money was proclaimed well warranted the conclusion that the person or persons who abstracted the money accomplished their work by having keys to the front door of the storehouse and to the desk. There was no indication of any breaking of the outside roller to the desk, nor any evidence of a violent entry into the drawer or the door inside of the desk. It is true that the door was found open and wrenched from the hinges, but as these hinges were inside of the door, and the lock of the door was unbroken, this wrenching of the door from its hinges could only have been done after the door itself was opened with a key. All of which indicated that the job was done by a bungler, who sought inconsiderately to leave evidence of a violent entry, which was transparently foolish."

One bankrupt had the indiscreet audacity to explain a considerable deficit by the story that he had lost it all in a robbery, when the fact was proved that, although there had been a robbery, the police had taken from the culprit everything he got, and there was no reason why the bankrupt had not received his money back. In re Smith, 185 Fed. 983.

Another favorite plot utilized by the novelist-bankrupt is the gambling plot. If the money is gone, he cannot be compelled to pay it over, and gambling is one good way of getting rid of money. So a bankrupt will frequently adduce a story which makes himself the hero of a resplendent course of gold-coasting, in which most of his gaming was either quite amateurish or under the ascendency of a singularly unlucky star. Such tales of gambling were rejected as improbable in the cases of In re Wilson, 116 Fed. 419, 8 Am. Bankr. Rep. 612; Schmeer *v.* Brown, 130 Fed. 728, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178, and In re Henderson, 130 Fed. 385.

One would-be gambler made the serious mistake of naming the "national indoor pastime" as the means whereby a loss of $2,000 had occurred. The court promptly "scraped his conscience" by quizzing him as to his knowledge of that pastime, and rejected his story as a fabrication, when, in its own wisdom, it discovered that the bankrupt had the most meagre knowledge of the game of poker, only being acquainted with "the simpler hands which any tyro might know." "He fails," said the court, "to meet a test of knowledge which any player of his claimed experience ought certainly to be able to meet." See In re Lasky, 163 Fed. 99, 20 Am. Bankr. Rep. 729. Just why his ignorance of the game should prove that he had not lost money at it may, prima facie, evoke wonderment. Still there is logic in the attitude of the court that a man would at least begin to have a bowing acquaintance with "aces-up" or "straight-flush" after those gentlemen had downed him a few times with large financial loss.

Sometimes the bankrupt is even more shameless and revives the old picaresque romance, and the later developments of that school by Fielding, Smollett, et als., making himself the hero of a tale of profligacy that would do honor to the early masters. Rather than disclose concealed assets, he pretends to have spent his funds in a life of reckless debauchery. In re Gottardi, 114 Fed. 328, presents a remarkable story of this kind, which the court promptly removed from the history shelf and placed in the category of fiction. The bankrupt in that case told the story of an intrigue, which he claimed cost him $6,500, $6,000 to "the woman in the case," and the balance to a physician for services. He refused to name either the woman or the doctor, however, and the court rejected his story as bald fiction.

In the same classification, the picaresque school, falls the very numerous class of bankrupt fiction using the plot of drunkenness. A mythical booze bout, a wild wassailing in the style of the ancient Briton, is used as an explanation for the nonproduction of funds. In the case of In re Cunney, 225 Fed. 426, two bankrupts, journeymen tanners, working at a wage of $15 a week, claimed that they drank and gambled away $7,200 within about four months. The court deemed the story so highly sus-

picious that the case was remanded for further evidence. Other drunkenness stories may be found in the cases of In re Tudor, 100 Fed. 796, 4 Am. Bankr. Rep. 78, and In re Wilson, 116 Fed. 419, 8 Am. Bankr. Rep. 612.

A final case may be mentioned as showing the puerility of the stories sometimes adduced by bankrupts, and the contumacious attitude in which they defy examination. In the case of In re Lewis, 163 Fed. 614, the bankrupt explained that he had spent $400 in a short time for "car fares," "shoe shines," and for "milk for the baby." The court dismissed this story by calling it a contemptuous one.

S. S. ALDERMAN.

## Cases of Interest

STRIKING OF HOURS BY CHURCH BELL AS NUISANCE.—The striking of hours by a church bell may constitute a nuisance, as is seen from a perusal of the case of Terhune *v.* Trustees of Methodist Episcopal Church (N. J. Ch.) 100 Atl. 342. That case was begun by bill to restrain the defendants, trustees of the Methodist Episcopal Church of Matawan, from making a noise by the ringing of the church bell, caused by the striking thereon of the hours. This noise it was alleged was of such an unusual degree as to render the dwelling of complainant uncomfortable, and to amount to a nuisance. The injunction was issued for reasons stated by Vice Chancellor Foster as follows: "I am satisfied that complainant has shown that the noise caused by the ringing of this bell in striking the hours causes him and others positive personal annoyance and discomfort to such a degree as to entitle him to relief from what is to him and others clearly a nuisance. And in reaching this conclusion I have taken into account the degree and character of the noise, and also the circumstances and necessity for its occurrence, and also the time or hours of its occurrence, and there is nothing before me to show the necessity for this noise, or that in any way a useful or public service is rendered to the community by the striking of the hours on this bell. . . . As complainant moved into his present residence some time after the bell had been installed, and had been rung for years for ordinary church services, I do not find that he has shown his right to have defendants restrained from continuing the ringing of the bell for such purposes; but a decree will be advised that defendants be restrained from having the bell rung or struck for the purpose of announcing the hours."

WIFE NOT LIVING WITH HUSBAND AS "DEPENDENT" UNDER WORKMEN'S COMPENSATION ACT.—A wife not living with her husband is not a "dependent" within the meaning of the word as used in Workmen's Compensation Acts merely because he is under the legal obligation to support her, but it must be shown that he has been furnishing actual support. Sweet *v.* Sherwood Ice Co., (R. I.) 100 Atl. 316, wherein the court said: "The petitioner argues that, the deceased being under a direct legal obligation to support his wife, the existence of such obligation must have an important bearing in the consideration and determination of the question of dependency. We do not think so. In the case of New Monckton Collieries *v.* Keeling, 4 B. W. C. C. 332, it was held by the House of Lords that the widow was not entitled to compensation, that the fact the husband was liable in law to support his wife was not sufficient to maintain a claim for compensation, and that the obligation or liability to support is not the same as actual support; and it was further ruled in that case that 'money coming to a widow under the act is not a present in consideration of her status; it is a payment by a third person to compensate her, as a dependent, for her pecuniary loss by her husband's death.' . . . In Dobbies *v.* Egypt L. SS. Co., 6 B. W. C. C. 348, it was held that dependency is a question of actual fact, and that actual fact is not settled by a consideration of the legal proposition or obligation of either the husband to the wife or of the parent to the child. The petitioner has cited in her brief some cases in support of her contention that dependency may be found where there is simply a legal obligation on the part of the husband to support his wife. These cases, upon examination, do not appear to be as broad in statement or as determinative of the question before us as the petitioner claims and insists. They do not baldly hold that the legal obligation determines the question of dependency, but that such legal obligation must be coupled with a reasonable probability that such obligation will be fulfilled."

WORKMAN EMPLOYED IN CUTTING TUNNEL FOR INTERSTATE RAILROAD AS ENGAGED IN INTERSTATE COMMERCE.—The question who is an employee engaged in interstate commerce receives further elucidation in Raymond *v.* Chicago, etc., R. C., 243 U. S. 43. Raymond, the plaintiff in error, sued to recover damages resulting from injuries sustained by him while in the defendant's employ. The petition alleged that the defendant operated an interstate commerce railroad between Chicago and Seattle and that for the purpose of shortening its main line and making more efficient and expeditious its freight and passenger service, was engaged in cutting a tunnel through the mountain between Horrick's Spur and Rockdale in Washington. It was averred that plaintiff was employed by the defendant in the tunnel as a laborer and that while he was at work his pick struck a charge of dynamite which through the defendant's negligence had not been removed and that from the explosion which followed he has sustained serious injuries. The defendant's answer contained among other things a general denial and alleged that at the time and place of the accident the railroad and Raymond were not engaged in interstate commerce, since the tunnel was only partially bored and hence not in use as an instrumentality of interstate commerce. It was held that this defense was adequate to warrant a judgment for the defendant on the pleadings. Mr. Chief Justice White writing the opinion of the court said: "Considering the suit as based upon the Federal Employers' Liability Act, it is certain, under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that under the facts as alleged Raymond and the Railroad Company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act."

LIABILITY OF INFANT FOR UNSKILFUL DRIVING OF AUTOMOBILE LENT TO HIM; DAMAGE TO CAR RESULTING FROM SUCH HANDLING.—In Brunhoelzl *v.* Brandes (N. J.) 100 Atl. 163, the facts showed that the owner of an automobile lent it to an infant by whose unskilful driving the car was damaged, and it was held that an action against the infant would not lie. The court said: "The general liability of infants for their torts does not take from them their special immunity from liability for their contracts; each rests upon a policy of the law. When these two policies come into conflict they cancel each other to the extent that they deal with the same subject-matter. If this cancellation be complete, so that all that is claimed as the foundation of the infant's tort is covered by the breach of his contract, nothing remains upon which to found an action of tort independently of the contract. The practical test therefore

would seem to be not whether the tort arose out of or was connected with the infant's contract, but whether the infant can be held liable for such tort without in effect enforcing his liability on his contract. In the present case the promise of the infant as bailee was that he would exercise reasonable care in driving the borrowed car. If injury came to the car because of the failure of the bailee to exercise such care, he cannot be held liable therefor in tort without being in effect held liable for a breach of his promise. The facts that constitute the breach of such promise cancel all of the facts that constitute the alleged tort, leaving nothing over and above the breach of the contract upon which to found an action. This result which harmonizes the two policies of the law cannot be frustrated by allowing a plaintiff to elect to sue in tort rather than in contract, as he might do in the case of an adult where no similar policy was involved. . . . In the earlier English case of Jennings *v.* Rundall, 8 Term Rep. 335, Lord Kenyon, C. J., and the other judges of the King's Bench laid down the rule that we are applying to the present case, an excellent statement of which, with ample citations, will be found in 14 R. C. L. 261."

RIGHT OF WIFE SUING UNDER CIVIL DAMAGE ACT FOR INJURY TO HUSBAND IN DRUNKEN BRAWL TO RECOVER DAMAGES FOR MENTAL ANGUISH CAUSED BY HIS DISFIGUREMENT.—Mental anguish as an element of damage was a subject of discussion in Billett *v.* Michigan Bonding & Surety Co. (Mich.) 161 N. W. 908. The action was under the Michigan Civil Damage Act and was against the surety on a bond of a retail liquor dealer. The plaintiff charged that her husband became intoxicated from liquor sold by the said dealer and was injured in a drunken brawl. The trial court gave damages for mental anguish due to the husband's permanent disfigurement by a scar on the face, but judgment was reversed by the Supreme Court. Stone, J., said: "That part of the charge, above quoted, would permit the jury to award damages for future injury to plaintiff's feelings because of the disfigurement of the husband's face, by the permanent scar. To show that plaintiff's counsel so understood the charge, we have only to look at his brief wherein he argues: 'As long as Mrs. Billett lives with her husband, that scar will be an occasion of shame and disgrace to her. She will be called upon perhaps many times to explain to others the cause of that scar. This ought to be worth the entire amount of the verdict itself.' In Sissing *v.* Beach, 99 Mich. 439, 58 N. W. 364, this court said: 'The court further instructed the jury that they had a right to take into account the injury which plaintiff may have sustained in her feelings on account of this injury to her father. This was error. The injury to the feelings, contemplated by the statute, is the shame, mortification, or disgrace arising from the fact of intoxication; and it does not include, as an element of actual damages, the mental anguish because of the injury received by the person so intoxicated.' "

LIABILITY OF STEAMSHIP COMPANY FOR CASTING BODY OF PERSON DYING ON BOARD STEAMER INTO SEA.—The much mooted subject of the property rights in a dead body is carefully discussed in Finley *v.* Atlantic Transport Co., (N. Y.) 115 N. E. 715. The plaintiff was the son of a person who took passage on one of the defendant's steamships bound from Liverpool to New York. The father died on board and though embalmed was cast into the sea off Nantucket by order of the defendant. The son was not on board. It was held on demurrer to the complaint that a cause of action for damages was alleged. Hogan, J., wrote the opinion of the majority of the Court of Appeals which in part was as follows: "At common law it is the duty of an individual under whose roof a poor person dies to carry the body decently covered to the place of burial and to refrain from doing anything which prevents in anywise a suitable burial. The body cannot be cast out so as to expose the same to violation or to offend the feelings or injure the health of the living. . . . The question as to whether or not defendant was under a legal duty to embalm the body in the first instance is not presented on this appeal. The contractual relations, if any, between the deceased and the defendant are not alleged in the pleadings. The only question before us is what duty devolved upon the defendant in view of the situation it created. It had prepared the body in such manner that danger was not to be expected and could not arise from the presence of the same on board the steamship. It carried the body on board the steamship 4½ days before the burial of the same. Ample means to defray the expenses of delivering the body at the port of New York was in possession of defendant, and plaintiff was at all times ready and willing to defray any expense incident to the delivery of the body to him for burial. Under the circumstances and the facts alleged in the complaint a reasonable discharge of the common-law duty required defendant to transport the body to the port of New York and deliver it to the parties entitled to the possession of the same for burial. At the time of the burial at sea the body could have been carried to port without injurious effect. Had the steamship been passing through the harbor of New York and approaching its dock, it could scarcely be said that the defendant would be justified in casting the body into the water from whence it could not be reclaimed, thereby depriving the next of kin of the solace of giving the body a decent burial on land. The action at bar may be, as is said, a novel one. The absence of precedent does not lead to a conclusion that there is not remedy for the wrong alleged to have been inflicted upon the plaintiff. The principles to which attention has been called in connection with decisions of the courts in analogous cases when applied to the facts stated in the complaint sustain the right of action in plaintiff."

RIGHT OF POLICE OFFICER TO ARREST WITHOUT WARRANT WOMAN ON STREET WHO ACCOSTED HIM WITH "HELLO THERE, KID."—The case of Larson *v.* Feeney, (Mich.) 162 N. W. 275, decided that a policeman was not justified in arresting, without a warrant, as a disorderly person, a woman who accosted him on the street with the words "Hello there, kid." The suit was begun by plaintiff to recover damages for the illegal arrest and imprisonment, the defendant being at the time of the occurrence a police officer in the city of Muskegon. When the proofs were closed the trial court withdrew from the jury all the questions except the one of damages. They returned a verdict of $33 for plaintiff, and defendant assigned error. The facts in detail were stated by the court as follows: "The real question involved in the case is whether the trial court was right in controlling the verdict as a matter of law. It appears that plaintiff, in company with her companion, Ruth Durham, was walking upon one of the public streets of Muskegon in the early evening, and as they passed defendant and two men who were talking with him plaintiff coughed and said, 'Hello there, kid.' The defendant and his companions then stepped into a cigar store, waited a moment, and came out again, as defendant says, 'for the purpose of giving the girls enough rope to see how far they would go with it.' Nothing further was done or said by the girls. Defendant followed them to the post office, where the plaintiff and her girl companion were taken into custody and locked up for the night. In the morning the plaintiff was taken before a justice of the peace, where it is said a complaint was made and sworn to by a stranger to the affair and a warrant issued thereon; that the complaint was explained to her by the justice, that she was

complained of as being a disorderly person because she solicited men for the purpose of prostitution, and that she pleaded guilty thereto and was fined, but in default of payment thereof she was sent to jail. Defendant seeks to justify his act in making the arrest under the authority of the charter of Muskegon, which confers upon policemen the authority to arrest without warrant any and all persons in the act of committing any offense against the laws of this state or the ordinance of the city. This authority is challenged by plaintiff's counsel, but he finally takes the position that if we assume that defendant had the power which he claims, he was not justified in making his arrest without a warrant, because plaintiff committed no act in his presence which would constitute her disorderly under the city ordinances. We are of the opinion that counsel is right in this contention. If plaintiff can be conclusively presumed to be a streetwalker or a soliciting prostitute by coughing and saying, 'Hello there, kid,' as she passes certain men on the street, the personal liberty of the citizen of this state has reached a pretty low ebb. As well might defendant have concluded that she was disorderly because she turned up her nose at him, or because she was saucy to him, or because she was silly or bold and said indiscreet things. It is possible for a girl to be bold, silly, and have bad manners on the street and still be immune from arrest without a warrant."

RIGHT OF DEPOSITORY OF MONEY TO RETAIN IT AGAINST DEPOSITOR WHO GOT IT THROUGH UNLAWFUL TRANSACTION.—The question suggested by the catchline was under consideration in McCaleb *v.* McCaleb, (Cal. App.) 163 Pac. 1044, the action being instituted by the plaintiff to recover from the defendant the sum of $1,000 alleged to have been received by it for the use and benefit of the plaintiff and to have been unpaid to him upon demand. The answer consisted in a denial that the defendant received the said sum or any part thereof for the use of the plaintiff. Upon the trial of the cause the following facts appeared: The plaintiff, who resided in the East, had gone out to California about a year before the episode occurred out of which the action arose, and while there had fallen afoul of some "bunco men" who "buncoed" him out of the sum of about $2,800. He went home, but about a year later returned with the resolution and intent of trying to recover his lost money. He presently fell in with another "bunco" sharp, who, under the pretense of co-operating with him in betting on a horse race, handed him $1,000 in bills. Instead of betting on the horse race the plaintiff went to the police department in Oakland with a view of procuring the arrest of the bunco men. The officer in charge demanded that he leave the money in the hands of the police department for use as evidence in case arrests were made. The plaintiff testified that he did this, though unwilling, and that, no arrests having been made, he later returned and demanded the money, which demand the police department refused to accede to, but instead turned the money into the treasury of the city of Oakland, which also through its proper officials has refused to deliver the same or any part thereof to the plaintiff upon his demand. Thereupon the action was brought. The only defense which was attempted to be urged at the trial was that the plaintiff had not shown sufficient title in himself to the money in question, although it was conceded that the defendant made no claim of title to it. The trial court held in the light of the foregoing facts that the plaintiff's possession of the money at the time of its delivery to the police department upon its demand therefor for the single purpose for which it was unwillingly handed over to its officers was a sufficiently superior title to enable the plaintiff to recover the money from the defendant, its depositary, claiming no title thereto. This position was upheld by the appellate court which said: "We think the view taken by the trial court upon this question was correct. It is conceded on both sides that the action for the recovery of money claimed to have been received for the use and benefit of another is in the nature of an equitable proceeding, wherein the plaintiff must prove that he has a better title to the money received than the defendant has to it; but the adoption of this principle does not lead to its application to the case of a defendant who has and claims no title to the money except that derived from its receipt from the plaintiff, but who nevertheless seeks to retain it upon the plea that the plaintiff originally came into possession of the money through some unlawful transaction. To make such application of the doctrine would be to open the door to every depositary of money having no right to retain the same save that arising out of the fact of the deposit, to put in question the sources from which a depositor himself derived the money. Our attention has not been called to any line of authority which supports such a contention."

## New Books

*Ruling Case Law, volumes 1–16.* William M. McKinney and Burdett A. Rich, Editors. Northport, N. Y., Edward Thompson Company; Rochester, N. Y., Lawyers' Co-operative Publishing Company; San Francisco, Cal., Bancroft-Whitney Company. 1917.

In bringing out the sixteenth volume of Ruling Case Law, a point has been reached where we may look either way with much gratification. The series is now more than half finished both as to the total number of volumes and in respect to the work done. The retrospective view discloses three years of consistent and sustained endeavor to supply a real need. The flood of law reports has for many years, with ever-increasing volume, swept on despite the futile protests of a profession engulfed in a sea of decided cases. The legal profession has been copiously supplied with compilations of varied character, prepared in the endeavor to render the entire mass of case law readily available for application to the almost infinite variety of questions that are daily presented to the courts for solution. But the theory of the utility of any compilation as leading the harassed practitioner into a happy valley of precedent where a "case on all fours" may be plucked from any bush is a fallacy. There are cases of close similarity as to the facts involved, but it is dependence on such similarities that at times has so tangled the skein of judicial thought that courts have found themselves under the necessity of abandoning an entire line of decisions and beginning anew. The thoughtful lawyer recognizes now that without a firm grasp of the fundamental principles case law is a region of many pitfalls where he may easily be lost. "I think that I recognize," said Lord Chief Justice Reading in addressing the New York City Bar Association, "a feeling of satisfaction which the members of the bar would have in getting rid of their thousands of volumes of decisions so that they might base themselves on the solid principles of the law."

In view of this situation, Ruling Case Law was designed to present a clear, concise, accurate and complete statement of the general rules and principles of the law, with their history and the reasons on which they are based, and with such illustrations of the principles stated as will facilitate their ready application to new cases on varying states of facts. It must be apparent to every lawyer that in a comparatively small portion of the multitudinous cases may be found a complete discussion of the whole body of theoretical law, and that the residue is of no importance in this respect. When a principle has been set forth

can that principle be strengthened or improved by citing the hundreds of cases which have reiterated it? The courts, some too long the slaves of technical precedents, now strive more and more to get at the merits, and in the opinions of the best judges there is a noticeable lack of the citation of corroborating cases.

The text of Ruling Case Law is supported by the authority of leading cases. These with their annotations afford, it is confidently believed, a better basis for stating the rules and principles of the law than can be had by citing all the cases. The reason is obvious. It is humanly impossible for the professional law writer (by whom most of our books are now written) or the occasional author, confronted with some tens or even scores of thousands of decisions to be read, analyzed, and cited in his treatise, to give to the statement of the law that deliberate care and study permitted to one who bases his work on authorities much less numerous and of an average character vastly higher. A treatise on a topic of the law is complete when it has stated and elucidated the rules and principles of the subject and has cited a sufficient number of the best cases to support the text, with due attention to diversities of opinion when they exist. More than this is the vain repetition of those who "think that they shall be heard for their much speaking." All the great commentaries have been written on this plan. Indeed, it is not probable than anyone would have the temerity to contradict the statement that no legal treatise can be of substantial value unless the author has made a close and careful study of every case which he cites. This fundamental requirement is apparent on every page of Ruling Case Law.

The weight and value of the cases selected as authorities under such a plan of legal exposition are of course of prime importance. Those cited in Ruling Case Law have been carefully set apart and annotated through a period of fifty years by masters of the art. It is apparent that the writers of articles devote genuine study to each and every one of these cases. They ably summarize the work of the Annotators steadily pursued for half a century. But the work, although so largely rested on time-tested decisions, is very far from ignoring judicial and legislative progress. Not only are many thousands of the cases new—yet warm with the breath of the judges who decided them—but the copious annotations, beginning with the splendid efforts of Judge Freeman half a century ago in the American Decisions, American Reports and American State Reports, and brought down to date in the Lawyers' Reports Annotated and the Annotated Cases, with all the improvements that modern ingenuity and efficiency could contrive, abound in discussions of fresh and timely topics. And the authorities cited, whether directly from the Annotated reports or indirectly through the medium of the annotations, *are all in point*. This may be said to be one of the special merits of Ruling Case Law.

The classification by articles alphabetically arranged is eminently practical. Great subjects of perennial interest are treated in Banks, Bills and Notes, Carriers, Constitutional Law, Contracts, Corporations, Damages, Death, Deeds, Descent and Distribution, Divorce and Separation, Eminent Domain, Equity, Evidence, Executions, Executors and Administrators, Fraud and Deceit, Highways, Husband and Wife, Injunctions, Insurance, Judgments, Landlord and Tenant.

From a group of treatises of so much excellence it is difficult to select any for special mention, and yet a few may be noticed, not as indicating any particular superiority over the others, but for the purpose of illustrating and emphasizing the character of the work which the joint publishers have planned and executed.

The article *Carriers* (Vols. 4 and 5) may fairly be said to be one of the most complete modern treatises on the subject. Every branch of it has been thoroughly developed under an arrangement especially designed for easy and ready reference. The chapter dealing with the regulation of carriers, especially rate regulation, may be mentioned as a conspicuous feature of this work. There is, perhaps, no other phase of the topic that in recent years has received such elaborate consideration at the hands of the Supreme Court of the United States, or is of so much present importance and interest, and all this wealth of precedent is now for the first time made readily accessible through the pages of Ruling Case Law. A tribute to its worth was the request of one of the great railroad systems of the country for copies to place in the hands of each of its numerous counsel.

*Constitutional Law* (Vol. 6, p. 1) is a notable contribution to legal literature. It is timely because there was a need for it, and it fulfils the need. It is an interesting fact in our political history that when the Constitution was adopted it was not possible to confer on the general government in direct terms the extensive powers which only a few statesmen then recognized as necessary. But in carefully veiled language the powers were conferred, and it was left to the Supreme Court of the United States to discover and announce them. The decisions of that court therefore supply the principal base for this article and never before have they been reviewed in such detail and with such exhaustiveness. This treatise has been characterized by an eminent constitutional lawyer as the most illuminating work on the subject now extant.

*Contracts* (Vol. 6, p. 573) is a clear, concise, accurate, complete and scholarly presentation of the principles of a subject which constitutes one of the grand divisions of the law, and is involved in an amazingly large proportion of the annual grist of decisions. The principles of contract law govern in so many of the questions with which the practitioner is daily confronted, that this subject may be said to be the base line from which he measures the most of his clients' rights and liabilities. The article has already been cited and quoted from in the courts' opinions to an extent that assures it a permanent place in legal literature.

As a matter which concerns the health, morals and general well-being of the people, the traffic in *Intoxicating Liquors* (Vol. 15, p. 239) has engaged a large part of the public attention for many years, and it has been very fruitful in litigation. At the present time, with the tide of popular opinion running so strongly against it, and threatening the destruction of a business yielding millions of dollars annually, the legal aspects of the situation cannot fail to attract attention. This article offers to the profession the latest as well as the best judicial thought on this important subject. The three grand divisions of legislative activity, viz., the policy of licensing and regulating the traffic as a legitimate business enterprise, local option or qualified prohibition, and absolute prohibition, are fully discussed in all their many bearings, as also are the matters of unlawful traffic and the civil rights and liabilities of liquor dealers, including the civil damage acts. In addition to the sound legal discussion this article is conspicuous for its scholarly style and the consequent pleasure which may be had from reading it.

The excellence of the articles in this work devoted to the large and familiar heads of the law must not obscure the merits of those smaller treatises on topics which have only recently achieved importance. Thus until quite recent times the law relating to *Food* (Vol. 11, p. 1094) was to be found in a few scattered decisions. The epoch marked by the last two decades has made, however, in this matter, as in social and economic affairs

generally, very great changes. The legislatures of nearly every state extensively regulate the subject, and the body of decisions is now large and rapidly growing. Here we have an article of some forty pages considering every phase of the subject with special attention to the validity and interpretation of statutory and municipal regulations. The common law liability for dispensing unwholesome food is the subject of a chapter of unusual interest.

Closely related is the article *Health* (Vol. 12, p. 1263). No question is of more importance in the regulation and control of human affairs. Yet it has remained for our own times, which, as the author observes, might well be styled the age of conservation, to take practical cognizance of the matter. There has been a steady tendency toward codes of rules to assist in guarding against illness and pestilence. The treatment here possesses that nontechnical interest which makes the article delightful for consecutive reading.

One does not have to go very far back in our law to reach a period where any discussion of the subject *Labor* (Vol. 16, p. 410) would have been confined to brief mention in the treatises on Master and Servant. Now it has achieved such importance that this separate article requires nearly one hundred pages for a review of the authorities. Combinations of employees and the mutual rights and liabilities of labor and capital naturally receive the greatest attention. The article also gives an outline of the legislation dealing with those matters commonly designated as labor laws. In his treatment of strikes the author has made excellent use of a specially full collection of decisions. This also is one of the many articles in Ruling Case Law which will be appreciated not only for its value as a legal treatise, but for casual reading.

Ruling Case Law takes cognizance of the development of new branches of our jurisprudence. Of recent years there has been a marked tendency to recognize the existence of a distinct tort to which the name "Interference with trade or calling" or some similar expression has been applied. Accordingly, we have in volume 15 (p. 42) a well-rounded article bearing the title *Interference*. A perusal of this highly interesting production will convince the reader of the wisdom of reviewing in one article the authorities dealing with those relations affecting a man's trade, calling or contract relations, interference with which by a stranger may result in liability, instead of dealing with them loosely under general discussions elsewhere. The stress of modern business has given rise to various methods which are condemned by the principles here laid down. Both the subject and the treatment of it are in the highest degree timely.

The great war lends special interest to the article *International Law* (Vol. 15, p. 94). As a practical manual for lawyers' use it will quickly take the first place. The chapters devoted to "War in general," "Naval warfare" and "Neutrality" are of very present interest. Value is added by the thoroughness with which the decisions of the United States Supreme Court are collected and cited. The lawyer interested in public utilities will appreciate the article *Franchises* (Vol. 12, p. 173). He will search in vain among his other books for any discussion so full and so clear in the statement of the doctrines pertaining to this subject. *Inspection and Physical Examination* (Vol. 14, p. 679) is the title of an article which illustrates the practical classification adopted in Ruling Case Law.

But with more than two hundred published articles attracting attention, special mention must stop somewhere. The names of the publishers and editors of this work give abundant assurance that the articles in the volumes to come will be of the same high character as those above mentioned.

# News of the Profession

THE MICHIGAN STATE BAR ASSOCIATION will hold its annual meeting at Grand Rapids, Michigan, this month.

NEW FEDERAL JUDGE IN TEXAS.—Former Congressman W. R. Smith of Colorado City has been appointed United States judge for the western district of Texas.

APPOINTED CITY JUDGE.—Daniel J. O'Rourke has been appointed judge of the city court of Toledo, O., to fill the vacancy caused by the death of Judge John M. Carr.

WISCONSIN JUDICIAL APPOINTMENT.—Walter Schinz of Milwaukee has been appointed to the bench of the Wisconsin Circuit Court to fill the unexpired term of Judge Ludwig.

THE ILLINOIS STATE BAR ASSOCIATION held its annual meeting at Danville, Ill., on May 31, June 1 and 2. Further details will be published in LAW NOTES for July.

DEATH OF PROMINENT LOUISIANA LAWYER.—Andrew A. Gunby, a prominent lawyer of North Louisiana and judge of the District Court for twelve years, died at Monroe, La., on April 7, aged 68.

THE ARKANSAS STATE BAR ASSOCIATION met in annual session at Hot Springs, Ark., on May 31 and June 1. Further mention of the meeting will be made in next month's LAW NOTES.

WELL-KNOWN LOUISIANA ATTORNEY DEAD.—John A. Richardson, formerly a judge of the Louisiana District Court and a recognized political leader in North Louisiana, died at Homer, La., on April 8, aged 67.

NOTED INDIANA LAWYER DEAD.—Kendall Moss Hord, formerly judge of the Indiana Circuit Court and prominent in political and lodge circles for many years, died at Shelbyville, Ind., on April 9, aged 76 years.

AMBASSADOR GERARD SPEAKS TO BAR ASSOCIATION.—James W. Gerard, former ambassador to Germany, was the guest of honor and principal speaker at a banquet of the Bar Association of Chicago, held in that city on May 3.

ILLINOIS JURIST DEAD.—Judge J. O. Cunningham, philanthropist, historian, former judge of the County Court of Champaign county, Illinois, and close friend of Abraham Lincoln, died at Urbana, Ill., on May 1, aged 87.

APPOINTED TO BENCH IN SOUTH DAKOTA.—Governor Norbeck of South Dakota has appointed L. L. Fleeger of Parker as the new circuit judge for the Second Circuit, an appointment made necessary by the act of the last legislature which provided for two judges in that circuit.

PORTRAITS PRESENTED TO COURT.—Oil paintings of the late Judge William M. Williams of Boonville and the late Judge John C. Brown of Fredericktown were recently presented to the Supreme Court of Missouri and placed among the jurists' portraits that adorn the walls of the two court rooms.

DEATH OF PROMINENT CHICAGO LAWYER.—William E. Church, a veteran of the Civil War, a member of the Supreme Court of the Territory of North Dakota under appointment by President Arthur, and prominent to the day of his death in Chicago legal circles, died at St. Joseph, Mich., on April 18, aged 76.

PROMINENT WEST VIRGINIA LAWYER DEAD.—Judge John W. Mason, chairman of the Republican national committee from 1872

to 1876, died suddenly at Fairmont, W. Va., on April 23, aged 75 years. Judge Mason until a few months ago was a member of the West Virginia debt commission recently appointed by the governor of West Virginia.

OHIO JURIST DEAD.—Judge William H. Day, one of the best known jurists of Ohio, died at Celina, O., on April 24. Judge Day was 76 years of age at the time of his demise and had a record of 35 years on the bench. He was judge of the Auglaize common pleas court for two terms, served as judge of the common pleas court of Mercer county and for a number of years was judge of the old circuit court.

NEW LAW FIRM.—Newton W. Gilbert, formerly Vice-Governor of the Philippine Islands, Richard Campbell, formerly judge of the Court of First Instance of the Philippine Islands, and John Caldwell Myers, formerly of Brown, Cooksey & Myers, and at one time a member of the editorial staff of the Edward Thompson Company, have formed a copartnership for the general practice of law in New York city under the firm name of Gilbert, Campbell & Myers.

VETERAN MASSACHUSETTS LAWYER DEAD.—Daniel Saunders, mayor of Lawrence in 1860, and a prominent Boston and Lawrence lawyer, died on April 19, at Lawrence, Mass., aged 94. He was the oldest practicing attorney in the state, the oldest living alumnus of Phillips Andover Academy, the oldest living graduate of Harvard Law School and the oldest ex-member of the State Senate. He is believed to have been the oldest Democrat to vote for Wilson last fall.

JUDICIAL APPOINTMENTS IN IOWA.—District Judge T. S. Stevens of Hamburg, Ia., has been appointed justice of the Iowa Supreme Court, succeeding the late Justice Horace E. Deemer of Red Oak. Shelby Cullison of Hartan has been appointed district judge to succeed Justice Stevens. The Governor has also made the following appointments to judgeships created at the last session of the Legislature: Fourteenth Judicial District, James Deland, Storm Lake; Eleventh Judicial District, G. D. Thompson, Webster City.

LOUISIANA BAR ASSOCIATION.—The annual meeting of the Louisiana Bar Association was held at Alexandria, La., on May 11. The official program included the following: President's address, by Edward T. Weeks, of New Iberia; "The Social Menace to Constitutional Government," by Rome G. Brown, of Minneapolis, Minn.; "The Right of Testamentary Disposition in Favor of the Posthumous Child," by Bernard Titche; "Needed Reforms in the Justice of the Peace Courts in Louisiana," by Charles F. Fletchinger; "The Widow's Dowry," by W. J. Carmouche.

APPOINTED TO OFFICE IN ILLINOIS.—Governor Lowden of Illinois has recently made the following appointments of members of the legal profession to public office: Leslie D. Puterbaugh, former judge of the Probate, Circuit and Appellate Courts, and vice-president of the State Bar Association, to be Director of Public Works and Buildings; William H. Stead, attorney general of Illinois from 1905 to 1913, to be Director of Trade and Commerce; Albert D. Early, president of the State Bar Association, to be President of the State Civil Service Commission.

JOHN G. JOHNSON DEAD.—John G. Johnson, one of the greatest corporation lawyers in the United States, died at Philadelphia, on April 14. Heart disease was the cause of his death. Mr. Johnson had been ill only two days. He was seventy-five years old and was attorney for the Sugar Trust, the United States Steel Corporation, the Pennsylvania Railroad, the Standard Oil, the Tobacco Trust and other corporations. He seldom appeared except in the United States Supreme Court. Mr. Johnson refused an appointment by President McKinley as Attorney General of the United States and also declined offers by Presidents Garfield and Cleveland to a place on the United States Supreme Court bench.

AMERICAN BAR ASSOCIATION.—At the annual meeting of the American Bar Association, to be held at Saratoga Springs, N. Y., on September 4, 5 and 6, Edgar T. Brackett of Saratoga will deliver the address of welcome, to which George Sutherland of Utah, president of the association, will respond. Senator Thomas W. Hardwick of Georgia will deliver an address on "The Interstate Commerce Clause of the Constitution of the United States." Reports of committees will be presented Wednesday morning. In the evening Charles E. Hughes will address the body. On Thursday morning William H. Burgess of Texas will deliver an address, after which there will be a discussion on the reports of the various committees. A reception will be tendered to the delegates by the New York State Bar Association on Tuesday evening in the ballroom of the Grand Union Hotel. On Wednesday afternoon there will be an excursion on Lake George.

DEATH OF NOTED FRENCH JURIST.—The death occurred, on March 16, of M. Ballot Beaupré, *premier président honoraire* of the Court of Cassation. Born at St. Denis (Réunion) eighty-one years ago, M. Ballot Beaupré's academic career was but the prelude of his fame in the *magistrature*. He graduated doctor of law, and was laureated. Before entering the *magistrature* he was secretary to the *Conférence des avocats*. Starting as *substitut* at Montbrison in 1862, he gradually climbed the ladder to the Bench. He was appointed *conseiller* of the Court of Cassation in 1882, and seven years later became *président de chambre*, and in the following years attained the summit of a French judge's ambition by being appointed *premier président* of the Supreme Court of France. It was in the year 1906 that the *premier président* became known throughout the civilized world, for it was under him that in the Court of Cassation, the chambers being united, the judgment in the Dreyfus case was quashed. Five years after this epoch-making event he retired, and was succeeded by M. Baudouin. M. Ballot Beaupré was honored by the Legal Profession for his juridical learning, his impartiality, and his high character.

## English Notes

SECRET AGENTS AS WITNESSES.—In the poison plot trial which terminated on March 10, in the conviction of three persons and the acquittal of the fourth, the Attorney General, with the respect for public opinion which he rightly believed to be compatible with the administration of the law without danger of any miscarriage of justice, did not produce as a witness the secret agent who was admittedly employed by the Government in obtaining evidence against the accused. "If," he said, "the jury were not satisfied without the attendance of Gordon (the secret agent) that the Crown had discharged the onus of proving the case, then he told the jury it was their duty to give the prisoners the benefit of the doubt and acquit them." The statement of the Attorney-General, in his reply on behalf of the Crown, that the employment of secret agents at this time is necessary, must be fully accepted. The relations, however, between

the Government and its informers are, to quote the words of Sir Erskine May, "of extreme delicacy. Not to profit by timely information were a crime, but to retain in Government pay and to reward spies and informers, who consort with conspirators as their sworn accomplices and encourage while they betray them in their crimes, is a position for which no plea can be offered. No Government, indeed, can be supposed to have expressly instructed its spies to instigate the perpetration of crime, but to be unsuspected, every spy must be zealous in the cause which he pretends to have espoused, and his zeal in a criminal enterprise is a direct encouragement of crime."

"DECLARATION OF MARRIAGE" IN SCOTLAND.—A point long and keenly discussed in the marriage law of Scotland has at last been disposed of in the recent case of Mackie *v.* Mackie (54 S. L. R. 250), so far, at least, as a decision short of one pronounced by the House of Lords can judicially settle a legal problem. The question was whether a promise of marriage followed by copula constitutes marriage, or merely affords ground for a declaration of marriage. If the former view was the right one, it would be open to anyone at any time to have the fact of the marriage declared; if, however, the latter view was correct, it precluded the competency of an action after the death of one of the parties. Lord Fraser in his standard treatise on Husband and Wife stated with great force the arguments for the second view. He was of opinion that originally a promise of marriage cum copula afforded ground for an action on the part of the woman to have the marriage solemnized; but as it was impossible to compel a man to solemnize, the decree ordaining him to do so was held to have the same effect. Then came the action of declarator of marriage in place of the older action for solemnization. As the court could not, however, order a dead man to solemnize a marriage, neither could it declare him married after his death. This train of ingenious reasoning has not been accepted in the case cited, and it has now been decided that the law of Scotland on the subject is that if there is a promise of marriage duly proved, followed by intercourse on the faith of it, there and then a marriage is constituted with all its consequences. Accordingly the action of declarator of marriage was held to have been completely brought after the death of the man.

PUBLIC DEBTS OF EXTINCT STATE.—A question as to whether under the new régime in Russia the government of that country will be responsible for the payment of the money advanced to the late government of Russia for the prosecution of the war was answered recently in the House of Commons in the affirmative without any reservation whatever. It is a settled principle of international morality that neither a change in the person of its ruler nor the complete transformation in the internal organization of its government can affect the treaties or public debts of a state so long as its corporate identity remains. As the people as a whole were bound at their creation by the acts of international agents, each new government succeeds not only to the fiscal rights, but to the fiscal obligations of its predecessor. The principle, indeed, goes still further when a state merges voluntarily into another state, or, when a state is subjugated by another state, the latter remains one and the same international person, and the former becomes totally extinct as an international person. No succession takes place, therefore, with regard to rights or duties of the extinct state arising either from its character as an international person or from its purely political treaties. Thus treaties of alliance or arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the state by which they have been concluded. A real succession, however, takes place with regard to the fiscal property and the fiscal funds of an extinct state. They both accrue to the absorbing state ipso facto by the absorption of the extinct state. But the debts of the extinct state, on the other hand, must be taken over by the absorbing state also. The Report of the Transvaal Concessions Commission (British State Papers, South Africa, 1901, Cd. 623), although it declares that "it is clear that a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist," nevertheless agrees that "the modern usage of nations has tended in the acknowledgment of such contracts." It may, however, safely be maintained that not a usage, but a real rule of international law based on custom is in existence with regard to this point.

BEQUEST TO CHILDREN WHEN THE YOUNGEST ATTAINS TWENTY-ONE.—In Hawkins on Wills, p. 279, 2d ed., by Mr. C. P. Sanger, the law is thus stated: "Rule. A bequest to the children of A., when the youngest child attains twenty-one, vests in all the children who attain twenty-one, to the exclusion, prima facie, of those dying under twenty-one: (Leeming *v* Sherratt, 2 Hare 14; Parker *v.* Sowerby, 1 Drew. 488; Lloyd *v.* Lloyd, 3 K. & J. 20; Cooper *v.* Cooper, 29 B. 229)." That statement has been regarded as good law for a considerable period, and many opinions have been written on the faith of it. It appears, however, from the recent decision of the Court of Appeal in Re Lodwig; Lodwig *v.* Evans (114 L. T. Rep. 881; (1916) 2 Ch. 26, affirming the judgment of Mr. Justice Sargant) that there is no such hard-and-fast rule of construction; and that the cases referred to do not bear it out. In Re Lodwig the trust was, out of the proceeds of the sale and conversion of a testator's residuary real and personal estate, to pay a weekly sum to his daughter-in-law, K. L., until the youngest of her children by his son attained the age of thirty years; and he directed that, after the youngest of his said grandchildren should attain that age, the trust funds should be divided between K. L. and her said children in equal shares; and if any one of his said grandchildren should die leaving lawful issue him or her surviving, the share of the parents so dying should be divided between his or her children. It was held that there was no rule of construction obliging the court to introduce into the gift to the class the contingency of attaining the age of thirty years; that the interests of the grandchildren who survived the testator were vested, and not contingent upon their attaining the age of thirty years; and that the trusts declared in favor of the children of K. L. were not void for remoteness. In Leeming *v.* Sherratt Vice-Chancellor Wigram said: "The testator having postponed the division of the residue until his youngest child attained that age (that is twenty-one), I think no child who did not attain that age could have been intended to take a share therein." Lord Cozens-Hardy, M. R., in the course of his judgment in Re Lodwig said that was nothing more than a dictum, and was very far from establishing any general principle by which the Court of Appeal ought to be bound. In future it is apprehended that the question will depend on the construction of the whole will, unfettered by what has heretofore been treated as a rule, but with a leaning towards the decisions in Leeming *v.* Sherratt and Parker *v.* Sowerby, where the circumstances are substantially similar.

SALES BY SOLICITORS TO CLIENTS.—As regards a sale by a solicitor to his client, the rule of the court, to quote the language used by Lord Eldon in the well-known case of Gibson *v.* Jeyes (6 Ves. 267, at p. 278), is as follows: "If he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given her"—the client in that case—"all that reasonable advice

against himself that he would have given her against a third person." That is to say, nondisclosure to the client of all the material facts in the knowledge of the solicitor is fatal to the validity of the transaction. In order to avoid this consequence, it is necessary to show that the fiduciary relationship of solicitor and client which imposes the obligation had been actually determined before the agreement for sale was entered into, or that the client has been "put at arm's length," as it is styled in some of the cases. Whether the latter result was brought about by the circumstance that the solicitor-vendor was one of the trustees of a will under which many beneficiaries took an interest—the property agreed to be sold forming part of the estate of the testator—was the important question raised in the recent case of Moody *v.* Cox and Hatt. The contention was that the doctrine enunciated in Gibson *v.* Jeyes (ubi sup.) and similar cases ought not to be applied to the present case because the vendor-solicitor was not dealing with his own property, and it was not a case in which his interest was in conflict with his duty; but that he owed a duty to the beneficiaries under the will. That duty was to obtain as large a price as possible for the property agreed to be sold. This view did not, however, commend itself to the learned judges of the Court of Appeal (Lord Cozens-Hardy, M. R., and Lords Justices Warrington and Scrutton). In the words of the Master of the Rolls, a solicitor may have a duty to his client as solicitor on the one side and a duty to his beneficiaries as trustee for them on the other. His placing himself in that position does not absolve him of that which the law declares to be his duty to his client. "If a solicitor gets himself into that position," added Lord Cozens-Hardy, M. R., "it is his own fault. He ought to make it quite clear before taking the step, and to inform his client of his conflicting duties, and either obtain from that client an agreement that he shall not perform his duty as to disclosure, or say—which would be much better—that he cannot undertake the business." After so clear a warning, the pitfall to be avoided should no longer be deemed to exist.

SETTLEMENT OF HEIRLOOMS.—The law has for centuries set itself against the policy of tying up property for generations. As to real property, the facts that an estate tail cannot be made indestructible by its grantor, that an estate cannot be given to the child of an unborn person, and that attempts to fetter the powers of a tenant for life under the Settled Land Acts can be disregarded, all tend to make it alienable. As to personalty, the rule against perpetuities prevents its settlement for more than lives in being and twenty-one years after. Chattels or other kinds of personal property cannot be entailed, but the result of an attempt to entail them is to give them absolutely to the first person who would have been tenant in tail without his having to go through the form of disentailing: (Re Chesham's (Lord) Settlement, 101 L. T. Rep. 9, at p. 11; (1909) 2 Ch. 329, at p. 333). The recent case of Re Beresford-Hope (116 L. T. Rep. 79; (1917) 1 Ch. 287) is instructive on the law of the settlement of heirlooms. The testator gave to his trustees certain chattels on trust to permit the same to go and be held, as far as the rules of law and equity will admit, with the Bedgebury Estate settled by his mother's will, with the usual provision that they should not vest absolutely in any tenant in tail by purchase of the said estate who should not attain the age of twenty-one years. The first tenant in tail by purchase died before his estate fell into possession, and Mr. Justice Eve held that he had an absolute interest in them so that they passed to his personal representative. The provisions in the will were not, in the opinion of the learned judge, strong enough to show that no one was to take unless he became tenant in tail in possession. That trust was an executed one, but the same testator created an executory trust of other chattels to be held as heirlooms, and Mr. Justice Eve directed them to be settled so as not to vest in any tenant in tail by purchase who dies under twenty-one or before he comes into possession or before the expiration of twenty-one years from the determination of all prior estates for life without in either of the two last-mentioned cases having with the consent of the protector of the settlement (if any) barred the entail in the settled freeholds or declared by deed that the heirlooms or any of them should (subject to any prior interest) vest in him absolutely. If the limitations were so framed as wholly to prevent a person who did not come into possession from taking an absolute interest, they might prevent a desirable resettlement being made. Hence the provisions as to the consent of the protector or the declaration by deed which enable a future settlement to be made by a person not actually in possession.

REPRESENTATION AS TO ABILITY TO PAY.—An excellent illustration of the applicability of section 6 of the Statute of Frauds Amendment Act 1828 (9 Geo. IV c. 14)—or Lord Tenterden's Act, as it is popularly styled—is afforded by what took place in the recent case of Banbury *v.* Bank of Montreal (116 L. T. Rep. 42). The section declares, the reader will call to mind, four instances in which a written memorandum is rendered necessary to the validity of a promise or engagement. Its effect in the case of one of them is, it will be remembered, that a representation or assurance made or given concerning another person to a third party "to the intent or purpose that such other person may obtain credit, money or goods upon" has to be in writing signed by the party to be charged therewith. Otherwise, no action can be brought to charge the person making the representation or assurance. "Upon or by reason of" a "representation or assurance" by the agent of a bank concerning the "ability" of a certain company to repay a mortgage debt was the ground of the plaintiff's action for damages against the bank. And a perusal of the elaborate judgments that were respectively delivered by the learned judges of the Court of Appeal, reversing the decision of Mr. Justice Darling, will supply all the information that may be desired as to the circumstances in which the question arose. It was in order to prevent the Statute of Frauds (29 Car. II, c. 3) from being trenched upon in the way that was exposed in Pasley *v.* Freeman (3 T. R. 53) that the Legislature were prompted to pass the amending Act. In the sense of ability to pay, as used therein, Lyde *v.* Barnard (1 M. & W. 101) is doubtless always cited as the leading authority. And it was much discussed in the present case, as, of course, was only to be expected. The conclusion arrived at by the Court of Appeal—that section 6 of the Act of 1828 was an answer to the plaintiff's claim for damages since the "representation or assurance" by the agent of the bank to him was not made or given in writing—had ample authority to support it. The two cases which were specially referred to of Hasluck *v.* Ferguson (7 Ad. & Ell. 86) and Swann *v.* Phillips (8 Ad. & Ell. 457) were singled out as being particularly in point. Lord Cozens-Hardy, M. R., considered that the court ought to follow those two decisions of the Court of Queen's Bench. The language of the section, said his Lordship, is perfectly general, and is not to be confined to a fraudulent representation or such a representation as would justify an action of deceit.

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"We know of but two exceptions to the rule of free trade by neutrals with belligerents; the first is that there must be no violation of blockade or siege; and the second, that there must be no conveyance of contraband to either belligerent." Chase, C. J., The Peterhoff, 5 Wall. 56.

# Obiter Dicta

TAKING THE FIRST DEGREE.—Green *v.* Craft, 28 Miss. 70.

ODDS AGAINST THE DEFENDANT.—Rains *v.* Diamond Match Co., 171 Cal. 327.

TRYING TO GET HIS MONEY BACK.—Hadacheck *v.* Chief of Police, 239 U. S. 394.

NERVING ITSELF FOR WAR.—United States *v.* Forty Barrels and Twenty Kegs of Coca Cola, 241 U. S. 265. Condemnation ordered.

AT THE BAT.—In O'Connor *v.* St. Louis American League Baseball Co., 181 S. W. 1167, the plaintiff made a motion to strike out.

SHOUTING IN VAIN.—The defendant in State *v.* Shout, in spite of vehement protestations of innocence, was sent to the penitentiary for two years.

OR HIS OPPONENT WILL.—"When a man has a case in court, the best thing he can do is to attend to it."—Per Clark, C. J., in Pepper *v.* Clegg, 132 N. Car. 312, wherein the plaintiff was made to smart for his gross neglect.

EXPERT TESTIMONY.—In People *v.* Robbins, 171 Cal. 469, a woman witness for the prosecution said in the course of her testimony: "There is no key-hole in the bathroom, simply a bolt. If there had been I would have peeked through it like any other woman."

IN LOCO PARENTIS.—"It is the legal duty of every one dealing with a child to protect it against its own discretion."—Per Beasley, C. J., in Danbeck *v.* New Jersey Traction Co., 57 N. J. Law 463. Apparently the phrase "in loco parentis" is of universal application.

BEWARE!—We deem it a duty to call the attention of those of the profession who have already enlisted in the Government service or who contemplate doing so, to the following Article of War, said to have originated with General George Washington: "Art. 31. Any officer or soldier who lies out of his quarters, garrison, or camp, without leave from his superior officer, shall be punished as a court-martial may direct." See 1 Fed. St. Ann. (2d Ed.) 452.

SOMEWHAT CONTRADICTORY?—"While it is gratifying that a great charity is to be saved, I regret to be compelled to feel that, in saving it, the law has not been saved. The majority of this court, however, have determined otherwise, and what they have decided must be regarded as the law in the case, notwithstanding my pronounced conviction to the contrary, to which I have given expression." Per Brown, C. J., dissenting, in Johnson's Estate, 249 Pa. St. 339.

PASSING THE BUCK.—"In the prevailing opinion some speculation is indulged in regarding the effect this dissenting opinion may have on the child and its welfare in after years when she shall grow up and become a woman. There is absolutely no ground whatever for apprehension on the part of my Brethren on that ground. The present interest and future welfare of the child is not, and will not be, prejudiced by the dissenting opinion. Whatever misfortune may come to this unfortunate child because of this litigation will be due, not to the dissenting opinion, but to the prevailing opinions." Per McCarty, C. J., dissenting, in Harrison *v.* Harker, 44 Utah 621.

REFUSING TO FOLLOW PRECEDENT.—"With the proviso cut away is there left only an incomplete enactment, one not symmetrically rounded out and, therefore, incapable of enforcement? If those questions must be judicially answered yes, then the whole act falls to the ground with the proviso—if no, then the law, bad in part, may be good in part; for the courts in this behalf do not apply the ideas shadowed forth in the metaphors of Paul and Solomon where the one speaks of a little leaven that leaveneth the whole lump, and the other comments on the all-pervading and unsavory effect of dead flies in the apothecary's ointment." See State ex rel. Bixby *v.* St. Louis, 241 Mo. 246.

TOUGH!—In Garrison *v.* Newark Call Printing etc., Co., 87 N. J. Law 217, an action by a married woman against a newspaper for libel, the court in one brief paragraph of the opinion held as follows: "Admission of evidence tending to show that plaintiff and her husband found it necessary, after the publication of the article, to appear frequently in public together. This was clearly relevant and competent in connection with the other evidence of unsavory notoriety just mentioned." In the absence of further explanation by the court, we are compelled to assume that the evidence was admissible in aggravation of damages.

ESTOPPED TO BE DEAD.—Mark Twain is credited with having said on one occasion when he returned from a trip over the seas that "the reports of my death have been greatly exaggerated." A similar skepticism is revealed in the mind of the court delivering the opinion in Freeman *v.* Frank, 10 Abb. Pr. (N. Y.) 370. Referring to a plea in the defendant's answer, the court said: "The fact that the defendant has answered, though by attorney, shows he is neither civilly nor physically dead. It is conclusive that he is living, and not under any disability that prevents him defending the action. The defendant, by answering, proves he is alive; and when he avers in his answer that he is dead, he is not to be believed. The answer, therefore, contains two contradictory averments, one of which in judgment of law is a fiction. If the defendant was dead, he could not answer. Hence the averment that he is civilly dead must be deemed untrue."

THE TRIALS OF THE INVENTOR.—The following from the pen of our good old friend Judge Lamm suggests that even in the realm of the law, the path of the inventor leads through the vale of ridicule: "The premises considered, we may not overturn the landmarks of the law; nor can we very well follow the lead suggested by the ingenious counsel for defendant. Speaking in figure of speech, we fear his eyes were washed and preternaturally brightened by tears of affliction springing from defeat *nisi;* and that he raises the point by force of distress and because no other was left to him, absent a bill of exceptions. The precept of the fireside, taught long ago at the mother's knee, an-

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nounced that drowning men catch at straws. We put this forward as a mild and good humored view, to shield us a bit from the serious charge fulminated in defendant's brief against plaintiff's counsel, to wit: 'That history repeats itself, from Columbus down to Newton, Fulton, Franklin and Ericsson, et al., that the inventor of, or believer in, any new idea should be ridiculed.'" See Linn County Bank *v.* Clifton, 263 Mo. 200.

AFTER TAKING A CORRESPONDENCE COURSE?—We are indebted to a North Dakota correspondent for the following incident: The attorney for the defense in a case at issue before a justice of the peace, mailed to the learned court an affidavit and motion for a change of venue on the ground of interest, prejudice and bias. The statutory fee was enclosed. The justice replied by mail in this manner:

"Attorney ————. Dear Sir: A justice court can do nothing for a defendant unless he, his attorney or representative is corporally present before or at the return hour of the summons. You are the only attorney in my experience as justice of the peace who has tried to practise by correspondence. If your request were granted and you desired, you could then take advantage of your own mistake. How could the other justice acquire jurisdiction of defendant if this court had not obtained jurisdiction of him, for the purpose of the transfer? Your correspondence and check is returned, if defendant wishes to take part in the case, he or someone in his behalf will have to be present, that is all I can say. Respectfully yours,

————, J. P.

"Post-script. I am trying to decide the matter the way I see it, whether I am following the law may be for some higher court to determine."

A MODEL FOR A LAW PRIMER.—"Lou Garner's monkey bit Sarah Phillips on her leg. Then he scratched her back and hand. She was hurt. She says she was in bed two weeks, was using a crutch and a stick a month, and was unable to work about six weeks. She had to pay a physician for attention and prescription, and to pay over five dollars for medicine. Lou kept her monkey in a cage at her house. One morning early he escaped, went to the premises where Sarah lived, and attacked her. The monkey also attacked a girl and a dog while out of his cage on this occasion. After Sarah was injured, Lou caught the monkey, put a chain on him, and carried him back to his cage. Sarah, in her testimony, gives a graphic description of the attack, her flight, and her fear. She says: 'He was a great big old monkey.' When asked if the monkey held on when he bit, she answered: 'Yes, sir; I drug him all the way up the steps and into the house. He had me by the leg, by the teeth.' . . . Lou Garner should not have permitted her monkey to run at large. She should have kept it confined and secure, so that it would do no harm. It was at large and did harm. She is answerable in damages for the hurt it has done." See Phillips *v.* Garner, 106 Miss. 828.

A CHAMBERS DECISION.—In Louisville, Ky., a few years ago, a freight car while in process of being switched from one track to another in the streets of the city, jumped the switch and crashed into a fence. Nineteen feet back from the fence was a house, wherein, the hour being four A.M., the occupants were sleeping peacefully in their chambers. What happened to some of those occupants is related in detail in the two cases reported under the title of Louisville, etc., R. Co. *v.* Chambers, 165 Ky. pp. 703 and 736. Mrs. Chambers testified that she was "thrown over the foot of the bed on to a rocking chair." In view of the fact that the freight car did not touch the house, the unfeeling court turned down Mrs. Chambers' story as incredible and reversed a judgment for $2,000 damages in her favor. As for Mr. Chambers, it seems that he was even in a worse case. He said that he awoke "to find his head entangled in the rods at the head of the bed, as the result of which, after extricating himself, he found 'a little knot' on the side of his head." Passing on this testimony the court said: "He saw no seeming peril; he is not here insisting that he sought to avert any seemingly impending danger and was thereby injured; he only knows that he awoke in the night, to find his neck entwined in the cool embrace of the rods at the head of his bed. How or when he got in that position he does not pretend to know. For ought the record shows, he may have been nestling in that snug caress for some time before the crash of the car or the scream of his wife aroused him to the stern realities of his peculiar situation; or he may have been awakened by the crash and while in a semi-conscious condition, have become so entangled; or he may have been awakened by the screams of his wife, and got in that position before reaching full consciousness." After which few remarks, the court, still unfeeling, reversed a judgment for $300 in favor of Mr. Chambers. No wonder there is so much criticism of the courts when they show themselves so out of sympathy with the troubles and tangles of everyday life and substitute their unsympathetic judgments for the honest, unbiased verdicts of petit juries.

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"We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the co-operation of a mob, with its accompanying acts of violence." Brewer, J., In Re Debs, 158 U. S. 598.

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"There is no 'practical experience' as to the chances of the continuance of widowhood, such as may be referred to where the probable continuance of life is involved." Peckham, J., Dunbar *v.* Dunbar, 190 U. S. 346.

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC.,

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# Law Notes

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### Aiding the Slacker.

IN our last month's issue we pointed out the patriotic service which could be rendered by the profession in refusing aid to persons seeking to resist the proceedings of the government in the prosecution of the war.

In any event it is to be hoped that the history of the present war will contain no such indictment of the legal profession as may be found in some of the reports of the provost marshals and examining surgeons of the civil war. In one of those reports it is said:

"The frauds most to be guarded against, as practiced by the enrolled and drafted men to escape service, are those sustaining claims of insanity, imbecility, general physical disability and deafness.

"These generally are subjects of contract, secured by some enterprising firm engaged in the business. Such a firm usually is composed of an active, venerable and experienced attorney at law and an elastic country doctor. The claim of the drafted man is presented with an overwhelming array of affidavits, which always render the statements more or less suspicious."

Specific incidents of the activities of such nefarious professional alliances are multiplied in the reports referred to.

It is encouraging to reflect that if this unsavory bit of history shows a tendency to repeat itself the actors will be dealt with far more effectively than in civil war times. The war department being in possession of records of the artifices then employed, the presidential regulations will contain adequate provision against their recurrence. And if the situation shall arise, the spectacle of a "shyster" lawyer in the clutches of the untechnical and summary military power will have an aspect of poetic justice which cannot but be enjoyed by the reputable members of the bar.

### The Growth of Humanitarianism.

THE law is a conservative science but is not unprogressive. One of the most interesting phases of its development is that which reveals the growth of humanitarianism; the increasing recognition that nothing offensive to humane instincts, whatever its apparent utility, can rest on sound public policy. The progress has been slow but sure; the idealism of one generation has become the accepted formula of the next. Thus of the once legalized practice of wife beating it was said in *Fulgham* v. *State,* 46 Ala. 143: "Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law." The powers of the schoolmaster survived somewhat longer, but as early as 1853 a court (*Cooper* v. *McJunkin,* 4 Ind. 290), while finding the rule too firmly entrenched in authority for judicial denial, said: "The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of his vocation, namely, school government. For such a teacher the nurseries of the republic are not the proper element. They are above him. His true position will readily suggest itself. It can hardly be doubted but that public opinion will, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government only the sources of his intellect and heart. Such is the only policy worthy of the state, and of her otherwise enlightened and liberal institutions. It is the policy of progress. The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the school-boy, 'with his shining morning face,' should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained." Since that decision the legislatures of many states have fulfilled the prophecy of Judge Stuart, and only the fact that corporal punishment has become practically obsolete in other jurisdictions has saved it from legal prohibition. It is exceedingly probable that the like parental power will in time fall under the legislative ban. Many will repel the idea, and advance arguments in support of its continuance. But whatever force may be accorded to those arguments, are they not the identical arguments which proved ineffectual in case of the prison warden, the ship captain, the husband, and the schoolmaster? And since self-correction always comes last, perchance when the state gets parents and persons in loco parentis regulated to its humane satisfaction it may take a glance at its own punitive methods.

### Domestic Amenities Curtailed.

THE recent law reports leave but little foundation for the accusation sometimes hurled in feminist quarters that "tyrant man" has moulded the law to the selfish advantage of his sex. We have elsewhere adverted to the passing of the ancient marital right of chastisement, citing

an authority from a state somewhat unresponsive to suffragist influences. Other cases from the same jurisdiction manifest even more markedly a curtailment of masculine prerogatives. "I will speak daggers to her, but use none," said Hamlet before his interview with the queen, but now even the verbal dagger is barred as a weapon of domestic controversy. In *Thomas* v. *State,* 92 Ala. 85, it was said that a man using profane language in a quarrel with his wife was guilty of disorderly conduct if his words were overheard by a female in an adjoining room. This was bad enough, for quarreling loses much of its zest when the "counterquip querulous" must be uttered at low breath to avoid legal consequences. But twenty-five years later the same court took away even this modified privilege by a holding that a man's wife, and forsooth his mother-in-law also, were within the protection of the statute against abusive and insulting language. *Jordan* v. *State* (Ala.) 68 So. 585. But the court, having stripped man of all his weapons of offense, holds before him the shining buckler of the law. In *Ex p. Daly* (Ala.) 69 So. 598, it was held that the act prohibiting abusive or insulting language applies equally to language used by a woman. So when husband, wife and mother-in-law sit down to discuss domestic problems, before the eyes of each hangs the sword of punitive justice to warn against undue warmth of speech—

"And the individual withers, and the world is more and more."

### Liberty of Conscience.

THERE is no enemy of a popular right so deadly as the man who grossly misuses it. Liberty is never in so much danger from tyrants as from those who seek to pervert it to license. In these days of national mobilization, much of anarchy and treason is urged in the name of liberty of conscience. True liberty of conscience is well illustrated by the recent decision of the English House of Lords affirming the decision of the Court of Appeal in *Secular Society* v. *Bowman,* (1915) 2 Ch. 447, wherein it was held that a testamentary gift to an incorporated society whose purposes are to promote the principle that human conduct should be guided by natural rather than revealed religion and to secure the elimination of sectarian and ecclesiastical influences in the law, is not contrary to law or to public policy. See LAW NOTES for June 1916, p. 45, for an extended comment on the decision of the Court of Appeal. The same principle was laid down early in history of our Republic in *Vidal* v. *Philadelphia,* 2 How. (U. S.) 127, wherein it was said that the constitutional provisions securing liberty of conscience and freedom of religious worship were "intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels." The perversion of that doctrine is illustrated by the contention made in *Reynolds* v. *U. S.,* 98 U. S. 145, that the liberty of conscience of the Mormons was infringed by the prohibition of polygamy. To this argument the court said: "The only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believe that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

It cannot be said too often or too emphatically that the freedom of a republic consists in the right to participate in the making of laws: it does not consist in a right to break them at pleasure. The law of a republic is just as binding on every subject as that of an autocracy. If one faction may resist or evade the enforcement of one law, others may resist or evade other laws. There is no middle ground between a government of law on one hand and anarchy on the other.

### Aesthetics and the Law.

WHILE under a recent decision of the Federal Supreme Court the power to curb to some extent the activities of the bill poster is now established, the decision rests on considerations of danger of fire, and the convenient place of concealment for criminals afforded by bill boards. No decision has yet recognized the power to regulate such structures on account of their recognized unsightliness. On that phase of the question it was said in *Passaic* v. *Paterson Bill Posting, etc., Co.,* 72 N. J. L. 285, 5 Ann. Cas. 995: "No case has been cited, nor are we aware of any case, which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." While that case has been very generally followed, it needs but slight familiarity with the law of nuisances to see that its generalizations are fallacious. Many persons have a taste for wild revels at all hours of the night, but the indulgence of that taste to the disturbance of neighbors has been checked in numerous instances. A man whose taste in motor boating is concerned only with speed may be prevented from cutting out his muffler to the annoyance of those of quieter taste. *State* v. *Huxford,* 35 R. I. 387, Ann. Cas. 1915C 1135. Vile smells have been abated even by the destruction of a profitable business. It is difficult to see the logic of a rule which protects the ear and the nose from offense but dismisses as "mere aestheticism" complaints of offense to the eye. Millions of the public money are spent annually on parks, boulevards and other public works which appeal to the sense of beauty. Due ornamentation is recognized as one of the requisites of a public building. Works of art are admitted free of duty though the burden of taxation on necessities is thereby increased. On what principle does the government which has burdened itself thus

largely in the interests of civic beauty deny to itself the power to prevent the nullification of its work for the personal profit of a few individuals?

In the last decade the conception of the police power has steadily broadened. The recent decisions sustaining the Adamson Law, the Blue Sky Laws, the Oregon Minimum Wage Act, and the Webb-Kenyon Law show plainly the modern view of the scope of public welfare which the legislature is empowered to guard. In that new orientation may well come a more positive recognition as a factor in human life of that love of beauty on which was founded the wonderful civilization of ancient Greece, and which has of necessity been ignored temporarily amid the strenuous work of developing a new country.

#### Selection of Judges.

IN a recent address Mr. Thomas W. Shelton, Chairman of the Committee on Uniform Judicial Procedure of the American Bar Association, discussed the much mooted question of the best method of selecting judges, making out a strong case for the view that the selection should be made largely on the recommendation of the local bar. By this means, he argued, politics both executive and popular may be eliminated, the proper independence of the executive and judicial departments preserved, and the selection placed in the hands of the only body of men having expert knowledge of the requisites for the judicial office and the comparative qualifications of the various candidates. He said in part:

"Is the selection of judges receiving sufficient or proper, or, in fact, any scientific attention? So great is the personal equation in all human endeavors that a disregard of it spells failure. Every available means of enlightenment should be exhausted in the selection. That inspires the question as to who is best qualified to select a judge from amongst lawyers? It is the practicing lawyers who know his habit of mind, his temperament, his measure of civic duty, his estimate of fundamental principles and his ethical viewpoint. Be sure that every member of the Bar has his measure of profundity, moderation, education, morality and ethics, and that it is as well known among his brethren as is his name and residence. Is it prudence or wisdom to disregard this important element?"

As against the theory of popular election, Mr. Shelton quoted effectively the words of the ultra democratic Jefferson: "With us all the branches of government are elective by the people themselves except the judiciary, of whose science and qualification they are not competent judges." While strong arguments have been made in behalf of other theories, it would seem that the plan whereby promotion in a technical service should be controlled by the experts in that service rather than by the laity rests on a solid foundation of reason.

#### Punishment by Fine.

A WRITER in a recent issue of a legal periodical (*Case and Comment,* April 1917) discusses the subject of punishment by fine in a manner that leaves little doubt in the mind of the reader as to the inequality of the system. He points out that the assessing of a fine against one man may be a very serious punishment, while to another it is no punishment at all. As a conclusion he says: "In the administration of criminal law neither directly nor indirectly should wealth or class be permitted to enter into the degree of punishment. Fines should be abolished. For trivial offenses now commonly punishable by fines with the alternative of imprisonment, other punitive means should be found, sufficient to bring about a realizing sense of contrition without the necessity of degrading and blunting the sensibilities by the imposition of prison sentences."

To a considerable extent the justice of this position must be recognized. Punishment by fine for offenses of a serious nature is quite indefensible because of its necessary inequality. It is a relic of a time when the chief consideration was the augmentation of the royal revenues, and is out of place in a system of jurisprudence based on loftier ideals. But with respect to petty offenses it seems difficult to devise a satisfactory substitute and the author of the article in question suggests none. The penalties for petty crime should be admonitory rather than punitive, and a pecuniary mulct, though involving no deprivation to the offender, serves adequately by way of admonition.

The evils of the system as so confined may be avoided by the manner of its administration. For instance, a fine should not be imposed for a petty offense on a man whose poverty makes it a severe punishment. If a well-to-do "drunk" is fined ten dollars, a day laborer guilty of the same act could well be dismissed with a warning. The alternative of a fine should never be allowed to a man guilty of a second offense; when admonition fails, real punishment should follow. A fine should not be imposed for an illegal act done for pecuniary profit unless the fine is much greater than the profit realized. To allow a man who has made fifty dollars by violation of law to escape by the payment of ten brings the law into contempt. There is no perfect method of enforcing the law, and there will not be until perfect men make and administer it. But while it is always easy to point out theoretical flaws a discriminating administration will minimize the evils which actually flow from them.

#### Imprisonment in Default of Bail.

ANOTHER instance in which the man without property is at a disadvantage when arrested on a criminal charge, is in respect to the matter of bail. A man of means obtains promptly his release on bail; the impoverished defendant must lie in jail perhaps for months awaiting his trial though he may be wholly innocent. The injustice is obvious enough, but the remedy is not so plain. Certainly a man able to give bail should not be denied the opportunity; certainly a man charged with a felony should not be released without bail because he is unable to furnish it. The so-called "Novolho Bill" now pending in the New York legislature provides that in case of conviction the time during which the accused was in prison awaiting trial shall be deducted from his sentence. This cures the injustice with respect to a man who is convicted, and it would seem that such a measure should be adopted. But in the case of a man acquitted on his trial there appears to be no redress for his unjust confinement except in a provision for compensation from the public funds. There are serious objections to that solution, among them the incentive to a jury of taxpayers to convict lest the county be saddled with the compensation paid to the accused. The proposition has, however, enough of natural justice to commend it to serious consideration.

**Status of the Automobile.**

IN a recent case (*U. S.* v. *One Automobile,* 237 Fed. 891) it was held that an automobile is not a "wagon" within a statute enacted in 1864 forfeiting any wagon in which liquor is hauled into Indian territory. The court said: "Motor vehicles were practically unknown in 1864. Though steam had been experimentally used in road vehicles as early as the last quarter of the eighteenth century, it was not until great improvements in steel making and working and in tools, the invention of the gas engine and its adaptation to liquid fuel, in the '70's and '80's, that motor road vehicles were recognized as practical; and it was yet later that the automobile was developed to a degree that, while it is a tremendous and valuable industry, it is also an incentive to great public and private extravagance and debt, too largely owned more or less conditionally by those not more than six lengths ahead of the wolf, infesting the public streets, contemptuous of the rights of pedestrians, like Jehu driving furiously—a rare combination of luxury, necessity, and waste. In their involved and complicated structure and propulsive force, they are the antipodes of wagons. Hence it seems clear that in 1864, in this statute, Congress did not intend 'wagon' to import a genus, and which will embrace as a subsequently created species thereof, the automobile."

In view of the fact that the automobile comes squarely within the reason of very many early statutes relating to vehicles, and has in fact largely displaced many of the vehicles originally contemplated by those acts, it would be unfortunate if such a holding should be generally followed. However, the great majority of the decisions seem to be to the contrary. In *Fifth Ave. Coach Co.* v. *New York,* 194 N. Y. 19, 16 Ann. Cas. 695, the court said: "A wagon is defined to be a wheeled carriage; a vehicle on four wheels. . . . The fact that they are now propelled by motors instead of being drawn by horses has not changed their character as wagons or removed them from the prohibition of the ordinance." An automobile has frequently been held to be within the term "vehicle" as used in a statute (*State* v. *Dunklee,* 76 N. H. 439, Ann. Cas. 1913B 754; *Foster* v. *Curtis,* 213 Mass. 79, Ann. Cas. 1913E 1116; *Lames* v. *Armstrong,* 162 Iowa 327, Ann. Cas. 1916B 511). In like manner the term "carriage" has been held to include an automobile. (*Trenton* v. *Toman,* 74 N. J. Eq. 702; *Scranton* v. *Laurel Run Turnpike Co.,* 225 Pa. St. 82; *Parker* v. *Sweet,* Tex. 127 S. W. 881.)

So rapid is the progress of mechanical invention at this period that it would involve infinite inconvenience if every new device required a revision of the statutes. The more progressive viewpoint is well illustrated by the language of the Texas court in *Parker* v. *Sweet,* supra: "Of course automobiles were unknown to our lawmakers when the statute under consideration was passed and they could not have had in mind specifically to exempt such vehicle, but this is not necessary. The legislature did have in mind the exemption to every family of a means of conveyance for the convenience and comfort of its members, and the use of the word 'carriage' in that connection is merely generic, indicating the use or purpose rather than the particular character of vehicle. An automobile is a carriage, used for identically the same purposes as the horse-drawn carriages of our fathers' days, the principal differences between the two being the motor power employed. From the standpoint of utility no distinction can be made between the two."

**Women and Bar Associations.**

IT is reported that the Brooklyn Bar Association, while expressing no hostility to women at the bar, has recently voted down an amendment admitting women lawyers to membership in the association. Some arguments may be adduced in support of that action, based principally on the idea that a city bar association partakes largely of the nature of a social club. That thought was expressed by one of the members of the Brooklyn association, who is reported to have said:

"You know we are approaching the time when we shall move into a new home, and when we get settled in that, just ask ourselves if we want one or two stray women sitting around."

But, conceding the force of that position, it seems to ignore the larger view of the subject that bar associations exist but secondarily as social clubs. Primarily they are or should be designed to promote the better administration of the law and to foster the highest ideals of legal ethics. The greatest danger, perhaps the only danger, to be apprehended from the presence of women at the bar is that it will engender sex antagonism, that they will practice law as women opposed to men and not as lawyers opposed to fellow lawyers. If such a tendency exists, will it not be strengthened by measures looking to any sex segregation in professional organizations?

**Workmen's Compensation.**

THE validity of workmen's compensation acts has now been put at rest by three decisions of the federal Supreme Court (*New York, etc. R. Co.* v. *White,* 37 S. Ct. 247; *Hawkins* v. *Bleakly,* id. 255; *Mountain Timber Co.* v. *Washington,* id. 260) sustaining the acts of New York, Iowa and Washington. The statutes sustained comprise a compulsory act, an elective act, and an act providing for a public insurance fund to which all employers engaged in hazardous occupations are required to contribute. In the New York case it was said: "If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, or risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety.

We have said enough to demonstrate that in such an adjustment the particular rules of the common law affecting the subject matter are not placed by the 14th Amendment beyond the reach of the lawmaking power of the state."

With those decisions there passes from many jurisdictions a vast body of law. Contributory negligence, the fellow servant doctrine, and assumption of risk will no longer harass the judges and send crippled suitors penniless into the world. With these unlamented doctrines go the ambulance chaser and the claim agent, the malingerer and the company doctor, the contingent fee and the fraudulently procured release. Truly it is a good riddance of bad rubbish. It needs now but a federal compensation act to put the greater part of the United States under the operation of a system which, while failing of adequate compensation in occasional cases, is yet the most equitable adjustment so far found of industrial hazards.

In this connection the bar is entitled to point with pride to the fact that, while the compensation laws entail a great diminution of litigated business, they have been passed with the hearty support and co-operation of the legal profession.

#### The Marshall Contempt Case.

THE proper independence of the judicial department and its officers was strikingly vindicated by the decision of the Supreme Court in the Marshall Contempt Case. (*Marshall* v. *Gordon,* 37 S. Ct. 448.) It will be remembered that Mr. Marshall, United States District Attorney for the southern district of New York, was in the course of presenting to the grand jury evidence tending to show that certain members of a "Peace Council" including a member of Congress were in the pay of the German Government and engaged in fostering acts of violence in the United States. Under a resolution offered by the accused member, the House of Representatives appointed a committee to investigate the proceedings of the district attorney. Mr. Marshall addressed to the committee a pungent letter of protest and was thereupon arrested for contempt of the House of Representatives. Releasing him on habeas corpus, the Supreme Court holds that the implied power of the legislature to punish summarily for contempt is confined to those acts which in and of themselves hinder or prevent the discharge of a legislative duty or the exercise of a legislative power. There is no power, it is held, so to punish for acts which merely affront the legislature or offend its dignity. In conclusion the court said: "The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers, manifested in state constitutions even before the adoption of the Constitution of the United States, by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion, and yet, at the same time, not substantially interfere with the great guaranties and limitations concerning the exertion of the power to criminally punish,—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted."

The spirited protest of the New York Bar Association against legislative interference with the independence of the judicial department in the Marshall case on which we have heretofore commented (LAW NOTES, July, 1916, p. 63) is thus fully sustained.

#### Corporation as Alien Enemy.

IN *Fritz Schultz Jr. Co.* v. *Raines & Co.,* 164 N. Y. S. 454, it was held that a company incorporated in the United States but whose stockholders are all citizens of Germany is not an alien enemy, and is entitled to sue in the United States. The court cites and relies on *Society for Propagation of the Gospel* v. *Wheeler,* 2 Gall. 105, Fed. Cas. No. 13156, and *Continental Tyre, etc. Co.* v. *Daimler Co.* [1915] 1 K. B. 893. The first cited case, however, rests in part on a technical insufficiency of the plea and in part on the charitable nature of the plaintiff, Mr. Justice Story saying on the latter point: "It would be highly injurious to humanity, as well as public policy, if institutions established in a foreign country for religious, literary or charitable purposes, might not, during war, obtain protection and patronage for their laudable exertions to soften private misery and diffuse private virtue." The English decision referred to was reversed by the House of Lords ([1916] 2 A.C. 307, Ann. Cas. 1917C 179), Lord Parker summarizing the conclusions of the court as follows: "(1) A company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. To use the language of Buckley, L. J., 'it can be neither loyal nor disloyal. It can be neither friend nor enemy.' (2) Such a company can only act through agents properly authorized, and so long as it is carrying on business in this country through agents so authorized and residing in this or a friendly country it is prima facie to be regarded as a friend, and all His Majesty's lieges may deal with it as such. (3) Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in de facto control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy. (4) The character of individual shareholders cannot of itself affect the character of the company. . . . The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents, or the persons in de facto control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings. The fact, if it be the fact, that after eliminating the enemy shareholders the number of shareholders remaining is insufficient for the purpose of holding meetings of the company or appointing directors or other officers may well raise a presumption in this respect."

Apart from the consideration that the decision of a

single judge, however able, is of little weight compared to that of the British court of last resort, the decision of the Lords seems to rest on the better reason. If the corporation as an instrument is controlled absolutely by alien enemies; if the money recovered by it goes into the full control of alien enemies, the reason of the rule precluding a recovery would seem applicable. With respect to the necessity of strictness and vigilance in dealing with instrumentalities of the enemy we may well take to heart the words of another distinguished court of our ally. In *Rex* v. *Vine Street Police Court* [1916] 1 K. B. 268, it was said: "Methods of warfare or ancillary to warfare have come into practice on the part of our foes which involve the honeycombing the realm with enemies, not only for the purpose of obtaining and dispatching information, but for purposes directly helpful to the carrying out of enterprises either actually warlike or eminently calculated to assist the successful prosecution of war. In a contest with people who consider that the acceptance of hospitality connotes no obligation and that no blow can be foul, it would, I think, be idle to expect the Executive to wait for proof of an overt act or for evidence of an evil intent."

## THE CONSTITUTION IN TIME OF WAR.

THE declaration of war against Germany is causing some uneasiness as to the fate of our constitutional rights, and many persons fearfully ask whether a state of war suspends the operation of any of the guaranties of personal liberty. Under a government such as ours it is inevitable that the extent of its legitimate powers should be the subject of frequent discussion, especially at times like the present. That this should be so is very right and proper, because it is only in such an atmosphere that liberty in a true sense can flourish.

It is a fundamental principle which can never be questioned that the government of the United States is one of purely delegated powers, and that there is no law for the government of citizens, the army or navy within American jurisdiction which is not contained in or derived from the constitution (*Ex p. Milligan,* 4 Wall. 141), and therefore it may safely be affirmed that every citizen is entitled to all the rights which the Constitution accords him whether the country is at war or at peace. It does not follow, however, that the same measure of freedom from restraint exists during a state of war as when the country is at peace, or that acts which would be innocent and harmless at the one time might not be serious offenses at the other. Every sovereign nation has inherent power to make war when it is necessary to secure or enforce the rights of its citizens. It is an attribute of sovereignty. The Constitution in giving Congress the power to declare war merely confided to that branch of the government a power which already existed, and consequently the grant carried with it every incidental power necessary to its exercise.

"When Congress declares war, by that declaration it puts in force the laws of war; and the war powers of the government, which are not to be exercised under the Constitution in time of peace, now come into full force, by virtue of the Constitution, and are to be exerted by the President and Congress. After the declaration of war, every act done in carrying on the war is an act done by virtue of the Constitution, which authorized the war to be commenced. Every measure of Congress, and every executive act performed by the President, intended and calculated to carry the war to a successful issue, are acts done under the Constitution." (*McCormick* v. *Humphrey,* 27 Ind. 144, 154.)

It is provided by the First Amendment that "Congress shall make no law . . . abridging the freedom of speech or of the press;" but this is not to be construed as meaning that Congress shall have no power at all to legislate regarding the matter which newspapers may print in their columns. It is perfectly well settled that this amendment, with the nine which follow it and constitute what is commonly called the Bill of Rights, was not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been expressed (*Robertson* v. *Baldwin,* 165 U. S. 281). The exceptions relate to matters the publication of which would be opposed to sound public policy, such as libelous, blasphemous, scandalous, obscene or indecent articles (*Robertson* v. *Baldwin,* 165 U. S. 281; *Harman* v. *U. S.,* 50 Fed. 921; *Arnold* v. *Clifford,* 2 Sumn. (U. S.) 238), and *a fortiori,* in time of war, Congress may forbid newspapers to print articles that would give information to the enemy or which would tend to thwart measures adopted for the prosecution of the war. The "freedom" which the First Amendment guarantees is not a license to give aid and comfort to a public enemy; it is freedom in the exalted sense of a good citizen claiming privileges and immunities which are and by right ought to be his. The illustrious patriots who framed the Constitution designed it "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty." They never intended to make it an instrument for the destruction of the government. The power to prevent the dissemination of information which might be useful to the enemy is clearly in Congress to be exercised according to its judgment, and in exercising such judgment it is clearly competent for Congress to establish a censorship. The demonstrated patriotism of the press of the country probably makes it unnecessary to do this, but it is nevertheless clearly within the constitutional power of Congress.

The Fourth Amendment declares that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized." Under this amendment it has been held that Congress has no power to authorize post office officials to open sealed letters and packages without a warrant particularly describing the thing to be seized (*Ex p. Jackson,* 96 U. S. 733). In a time of peace such searches and seizures would be unreasonable, but in a time of war, if it appeared that treasonable correspondence was passing through the mails, it would be monstrous and it

might be disastrous to apply the same rule. Under such circumstances a censorship of the mails would not be unreasonable. When a nation is at war its existence is in peril, and a construction of the search and seizure clause which would debar such protective measures would make the Constitution an instrument which could be used for the destruction of the government.

In regard to the right to trial by jury of persons accused of crime, which is the most important of all the constitutional safeguards, the law may be regarded as well settled. As long as the civil courts are open and unobstructed in the discharge of their functions, every citizen, unless in the military or naval service, is entitled to a trial by jury. An opinion somewhat different from this was given by the Attorney General of the United States in 1865, but in the following year the Supreme Court settled the law as stated above, in the case of *Ex p. Milligan,* 4 Wall. (U. S.) 2. In that case the petitioner was arrested during the civil war by order of the military commander of the district of Indiana on charges of conspiring to seize munitions of war, to liberate prisoners of war, and other disloyal and treasonable practices. He was tried before a military commission, convicted and sentenced to be hanged. At that time order prevailed in the State of Indiana, and the civil courts were holding their sessions as usual. The Supreme Court held that the military commission was without jurisdiction in the premises.

Mr. Justice Davis said:

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where the authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'"

In the present war with the scene of the conflict at a distance of 3000 miles it is not probable that there will be any occasion to declare military law, and consequently it is not probable that any question will arise as to the denial of the right to trial by jury. But the war power of the government is now in operation by virtue of the Constitution, so that the legislative power of Congress is extended to cover matter necessary to the prosecution of the war. It must take such measures as are necessary for the safe transportation of the army to the field of operation, which requires among other precautions, the utmost secrecy possible as to the movements of troops. It must control the food supply of the country. It must provide munitions of war. These and many other things must be done and the power given to Congress to do them is full and ample. Legislation legitimately adapted to these ends may work hardship to individuals, but it will not be a denial of any constitutional right. C. P.

## COMPULSORY MILITARY SERVICE.

FROM the time governments were instituted among men the arms bearing populations have had to meet the call of the nations in stress of war. No government has ever existed, nor could exist, without the right to the personal military service of all its able-bodied men. This principle was recognized in the Roman Empire and has been asserted by all civilized governments. It has been laid down as a principle on which all social organization rests, that each one owes to all of his associates the duty of defending them against external dangers, without which there could be neither government nor society. While the right and power to compel military service on the part of our citizens is provided for by the Constitution as a necessary concomitant to the power given to raise armies, it cannot be said that the power had its origin in a constitutional grant, for it is an obligation older than any written constitution, and those clauses of the Constitution which authorize Congress to raise and maintain armies do not create the obligation but recognize it and provide for its enforcement.

"It is a fundamental principle of national law, essential to national life, that every citizen, whether of age to make contracts generally or not, is under obligation to serve and defend the constituted authorities of the state and nation, and for that purpose to bear arms, when of sufficient age and capacity to do so, and when such service is lawfully required of him. The power to enforce that obligation, so far as the necessities of the state may require, is an incident of state sovereignty, and the subject of state constitutional and statutory regulation." *Lanahan* v. *Birge,* 30 Conn. 438.

And in *Burroughs* v. *Peyton,* 16 Gratt. (Va.) 470, it was said: "The power of coercing the citizen to render military service is indeed a transcendent power, in the hands of any government; but so far from being inconsistent with liberty, it is essential to its preservation. A nation cannot foresee the dangers to which it may be exposed: it must therefore grant to its government a power equal to every possible emergency; and this can only be done by giving to it the control of its whole military strength."

However, it was naturally to be expected that a power, so comprehensive in its scope and so far reaching in its effect on the lives, liberty and property of the people, would not be allowed to stand unchallenged and the validity of the various so-called conscript laws, enacted by the Congress of the United States and by the Confederate States Congress, were more than once called into question by those wishing to avoid or escape the obligation to render military service. But in no case, either in the state or federal courts, were their contentions sustained, and it would seem that the constitutionality of such laws is so well established that the futility of attacking them

would be recognized by even the most conscientious objector, contentious litigant or timorous soldier. The motives and considerations governing the constitutional convention when adopting that clause of the Constitution which empowers Congress to compel the citizens to render military service was stated in *Kneedler* v. *Lane,* 45 Pa. St. 238, as follows: "It is manifest that when the members of the convention proposed to confer upon Congress the power to raise armies, in unqualified terms, and when the people of the United States adopted the Constitution, they had in full view compulsory draft from the population of the country, as a known and authorized mode of raising them. The memory of the Revolution was then recent. It was universally known that it had been found impossible to raise sufficient armies by voluntary enlistment, and that compulsory draft had been resorted to. If, then, in construing the Constitution we are to seek for and be guided by the intention of its authors, there is no room for doubt. Had any limitation upon the mode of raising armies been intended, it must have been expressed. It could not have been left to be gathered from doubtful conjecture. It is incredible that when the power was given in words of the largest signification, it was meant to restrict its exercise to a solitary mode, that of voluntary enlistment, when it was known that enlistments had been tried and found ineffective, and that coercion had been found necessary. The members of the convention were citizens of the several states, each a sovereign, and each having power to raise a military force by draft, a power which more than one of them had exercised. By the Constitution, the authority to raise such a force was to be taken from the states partially, and delegated to the new government about to be formed. No state was to be allowed to keep troops in time of peace. The whole power of raising and supporting armies except in time of war was to be conferred upon Congress. Necessarily, with it was given the means of carrying it into full effect. I agree that Congress is not at liberty to employ means for the execution of any power delegated to it that are prohibited by the spirit of the Constitution, or that are inconsistent with the reserved rights of the states, or the inalienable rights of a citizen. The means used must be lawful means. But I have not been shown, and I am unable to perceive, that compelling military service in the armies of the United States, not by arbitrary conscription, but, as this act of Congress directs, by enrollment of all the able-bodied citizens of the United States, and persons of foreign birth who have declared their intention to become citizens, between the ages of twenty and forty-five (with some few exceptions), and by draft by lot from those enrolled, infringes upon any reserved right of the states, or interferes with any constitutional right of a private citizen. If personal services may be compelled, if it is a common duty, this is certainly the fairest and most equal mode of distributing the public burden."

Many other cases are to be found which uphold the constitutionality of conscript or draft laws, among which may be cited the following: *Ex p. Hill,* 38 Ala. 429; *Jeffers* v. *Fair,* 33 Ga. 347; *Walton* v. *Gatlin,* 60 N. C. 318; *Ex p. Caupland,* 26 Tex. 386; *In re Griner,* 16 Wis. 423; *In re Wehlitz,* 16 Wis. 443, 84 Am. Dec. 700.

The only case bearing on the constitutionality of conscript laws, decided since the adoption of the constitutional amendment against involuntary servitude, was *Robertson* v. *Baldwin,* 165 U. S. 275, which involved the validity of laws relating to seamen. In an obiter, Mr. Justice Brown announced a rule that would seem adequate to cover the present issue, as follows: "The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words 'voluntary servitude' were said in the Slaughter-house cases, 16 Wall. 36, to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview."

In this connection it is well to remember that the machinery of the government provides a method for contesting the validity of its laws and this method does not include resistance or conspiracy to resist its enforcement. Past experience would seem to emphasize the futility and danger of such methods, as witness the draft riots during the Civil War and the unpleasant consequences to the participants. Although there is no provision in the present draft law covering such cases there is ample authority conferred by other statutes under which such offenders may be adequately punished. Indeed, it has been held that persons who conspired to resist the execution of the Civil War draft were guilty of levying war against the United States and although there must have been a use of force it was not necessary that there should be any military array or weapons. The crime might be committed by those not personally present at the immediate scene of violence if they leagued with the conspirators, and performed any part, however remote. *Druecker* v. *Salomon,* 21 Wis. 621.

The recent draft law provides that any person who shall wilfully fail or refuse to present himself for registration or submit thereto as provided shall be guilty of a misdemeanor and shall, on conviction, be punished by imprisonment for not more than one year, and shall thereupon be duly registered. Other statutes exist, however, under which it would seem that an additional punishment has been provided for those leaving the district in which they are enrolled or the jurisdiction of the United States in order to escape the draft. Section 1998 of the Revised Statutes of the United States (37 Stat. L. 356, 2 Fed. Stat. Ann. [2d ed.] 120) as amended by the act of August 22, 1912, provides as follows: "Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond

the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six of the Revised Statutes of the United States: Provided, that the provisions of this section and said section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace: And provided further, That the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests." The penalties and forfeitures provided by section 1996 (13 St. L. 490, 10 Fed. Stat. Ann. 1069) and by the section just quoted made applicable to persons violating it are that such persons shall be deemed to have forfeited their right to citizenship, and shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereunder.

Granted the power to enforce military service on the part of its citizens, the question naturally arises as to the manner and to what extent this power may be exercised. It may be broadly stated at the outset that there are no limitations on Congress in the exercise of this power, beyond its responsibility to the people, and under it every citizen of sufficient age and capacity may be called into the military service of the country. The claims of parents to the custody and services of their children must give way before the call of the government, and, when thought to be necessary, wives must relinquish the society and support of their husbands. Even those who have not become citizens of the United States in the fullest meaning of that term may be impressed into its military service in time of need, and the present law contains a provision calling on all those, not alien enemies, who have declared their intention of becoming citizens to enroll preparatory to the draft. Such provisions are not without precedent in our own country—aliens who had taken out their first papers were held to be subject to draft under the act of Congress of May, 1792 (*In re Wehlitz,* 16 Wis. 443); and foreigners domiciled in the Confederate States were held to be subject to military service under the statute of 1864 declaring that all white men betweeen the ages of seventeen and fifty should be subject to the military service of the Confederate States (*In re Pille,* 39 Ala. 459). Children of aliens born in the United States are declared by statute to be citizens of the United States and as such are subject to the military draft, nor can they renounce such citizenship on becoming of age except by residence in a foreign country and by conforming to the legal requirements for expatriation. In this respect the English law differs from ours and a rather curious case, not to say a very embarrassing one to the person concerned, has recently been before the English courts for decision. A boy, nineteen years of age, born in England of German parents and who continued to reside in England, though his parents lived in Germany, was drafted into the English Army. He claimed exemption as an alien enemy, but the court held that under the English law he was an English subject and until he made a declaration of alienage he must remain an English subject, and that as under the English statute he could not make such a declaration until he was twenty-one years of age he must serve in the British army until that time, when he could make his declaration and become a German subject. *Sawyer* v. *Kropp,* Div. Ct. 14 L. G. R. 989, 115 L. T. 232 (1916) W. N. 284, 80 J. P. 327, 32 T. L. R. 650, 60 S. J. 656. The court did not say what was to become of him in that event but contented itself with holding that under the law he was a British subject until he made his declaration of alienage and as such liable to serve in the British army, saying: "The respondent is deemed to be a natural-born British subject under sect. 1 (1) of the British Nationality and Status of Aliens Act 1914. He is a person born within His Majesty's dominions and allegiance, but he is also a German subject because his parents are German, and therefore he comes within sect. 14 (1) of the same act. On coming of age he will be entitled, if he is not under disability—a matter with which we need not deal—to make a declaration of alienage, and he would then cease to be a British subject, and would pass over to the German nationality of his parents. But the question is what is his liability in the meantime. As pointed out by Mr. Schiller, it is very inconvenient that the respondent should owe two allegiances, and that he should under German law be a subject of Germany, and under English law a subject of Great Britain, but that inconvenience has happened before on the outbreak of war and will happen again. It does not follow that because it is inconvenient, or because one cannot exactly follow up the consequences which may result, one is not to deal with the statutes as one finds them. The magistrate has held that the respondent when of full age may make a declaration of alienage, and that he is an infant in law, and to take advantage of his infancy before he has had the opportunity of making a declaration of alienage seemed to be contrary to all principles of law and equity, and therefore he discharged the respondent. I do not think that that reasoning is right. The respondent is a British subject until he makes a declaration of alienage, and being a British subject he is liable to serve. We cannot enter into the inconveniences and difficulties of the matter in any way in which the magistrate appears to have done. It is our duty to decide what the law is, and if there is an inconvenience we cannot help it. There is certainly inconvenience in either view. The Army Council has issued an instruction in which this very case is dealt with, and it would make the respondent liable to serve, though only in particular departments of the service. The case must be remitted to the magistrate with a direction that he ought to have found that the respondent was liable to serve."

That the temptation to encroachment on the powers of government by its administrators is strong is not to be denied, and that the war power, in all its bearing, is particularly liable to abuse may be conceded, but it must be remembered that there are powers, and prominent among them is that of war, which cannot be made sufficiently ample for probable contingencies, and yet so guarded, in the grant itself, as to avoid possible abuses. The philosophy of our system of government would seem to be to make the grant large enough to meet such contingencies and to provide against abuse in the structure of the government. The responsibility of the representative to his constituents and his community of interest with them predispose him to act with caution and fidelity, and the always recurring election is a potent corrective of his errors, whether of judgment or purpose. Nothing is more abso-

lutely certain than that the vast operations of government cannot be conducted without more or less of trust—of confidence. In speaking of the power to compel military service as provided for in the Constitution of the Confederate States, which was in terms nearly identical with that of the United States, it was said in *Parker* v. *Kaughman,* 34 Ga. 136: "It must not be forgotten that governments, however free in theory and in practice, have their parts to act in the grand drama of international affairs. They must hold intercourse, and maintain relations, with all other governments, whether free or despotic. They may have controversies—wars, with the most absolute and potent. When this issue comes, there is no necromancy in republicanism to spirit away the invader—no magic spell to resolve into friendliness his hostile purpose. It is an issue of force, and the Republic must put forth man for man, gun for gun—must match strength with strength. It is concession enough to Liberty that with us, even in such crises, the power is wielded by no usurping or hereditary despot, according to his caprice, but by chosen representatives of the people, in accordance with the principles and usages of free governments. Still, it must be real power, power over the citizen, which he may not resist; else, oversensitive republicans, aspiring to independence of their own government, may be enslaved by another. We cannot suppose that either the framers of our Constitution, or the people who adopted it, preferred to leave the liberties and the sovereignty of the country at the mercy of foreign potentates, rather than invest the public councils with the power of defending them; that they dreaded foreign conquest less than domestic rule. Let us realize, at once, that war is an abnormal condition of society; and that where it obtains, whatever be the form of the government, the status of the citizen or the subject is more or less modified to meet its demands. The citizen is transmuted into the soldier, and the soldier is, ex necessitate rei, subjected to arbitrary rule, such as the citizen knew not before. The freeman's consolation is that every sacrifice, whether of personal ease or freedom of action, of property, of health, or of life, is an offering on the altar of liberty."

As in former draft laws provisions are made in the present law for numerous exemptions, including national and state officers, members of religious sects whose creeds forbid its members to participate in war, and persons engaged in such industries as the President, under the authority conferred on him by the act, may determine to be necessary to the maintenance of the military establishment during the emergency; also those with persons dependent on them for support which renders their exclusion or discharge advisable, and those who are physically unfit. There is one difference, however, between the present draft law and those of former years: In the present law no provision is made for substitutes either in men or money, and all not exempted under the act must render their personal service, whether rich or poor, cultured or untutored. Exemptions, however, are not contracts made with the government but only a personal privilege. *Com.* v. *Rogers,* 2 Pittsb. (Pa.) 377. And it has been held that a contract between a Congress and a citizen whereby the government was forbidden to call him into the military service of the country would be declared void as against public policy. *Burroughs* v. *Peyton,* 16 Gratt. (Va.) 470. So, being a privilege merely and not a contract, an exemption formerly granted may be revoked by subsequent legislation. *Com.* v. *Bird,* 12 Mass. 443.

Under the former conscription acts many cases arose as to the rights of persons claiming exemptions because of the nature of the occupations in which they were engaged and, doubtless, this will be one of the difficult problems for settlement by the exemption boards provided for by the present act. The chief difficulty seems to have been to determine just what was meant by the term "regularly employed." In the present act the term used is "engaged," but the two terms are unquestionably used in the same sense and a construction of the former should prove helpful in determining the exact meaning of the latter. That the industry on which the claim of a person to exemption is based shall be his regular occupation and employment and not that at which he may work occasionally seems too clear to be disputed. Those excused from military service on account of their occupation are exempted not for their own use, and as a favor to themselves, but for the benefit of the public, whom, it is supposed, they can serve better by working at their trades than in any other way. Those exempted for such reasons have been likened to common carriers in so far as their readiness to serve the public is concerned. Speaking of a mechanic exempted because of his trade, the court in the case of *In re Grantham,* 60 N. C. 73, said: "He must stand towards the community upon the some footing that a common carrier does, so that all persons who may have occasion to claim the aid of his services may, at all seasonable times, be able to obtain it." There are many decisions involving the right to exemption from military service on account of the occupation in which the person drafted was engaged, but as each case necessarily depended on the particular facts surrounding it no attempt will be made to set them out here. It may be mentioned, however, that according to two early decisions ministers authorized to preach by the rules of their church and regularly engaged in their ministerial duties did not lose their right to exemptions from military duties because of the fact that during the week they engaged in farming or other secular occupation in order to add to the family support. *Ex parte Cain,* 39 Ala. 440; *King* v. *Daniel,* 11 Fla. 91.

Exemption from military service being a personal privilege must be pleaded or claimed at the proper time and before the proper tribunal, and if not so done is waived. *Com.* v. *Rogers,* 2 Pittsb. (Pa.) 337. The exemption being annexed to the services of the individual, when the cause for the exemption ceases, the exemption ends with it. Thus when a minister ceases to preach or an agriculturist to raise food for the public, the exemption ceases, notwithstanding he may still be a minister or an agriculturist by trade.

The present draft law specifically provides that no exemption or exclusion shall continue when the cause therefor no longer exists, and, as heretofore stated, being a privilege merely and not a contract, an exemption formerly granted may be revoked by subsequent legislation. In this connection it is interesting to note the new English act dealing with the review of exceptions from military service formerly granted. Three classes of men can under this act be notified by the Army Council for the purpose of reviewing their exceptions from military service. These classes are: (a) territorials not suited for for-

eign service, (b) men discharged from the navy or army as disabled or ill, including officers whose commissions have ceased by reason of ill health or disablement, and (c) men who have been previously rejected on any ground, either after an offer to enlist or after becoming subject to the Military Service Act 1916. Any man receiving a fourteen days' notice to this effect is to be deemed to come under that act, and on noncompliance with the notice can be fined up to £5 or imprisoned up to three months. Disabled men who have had one month with the colors, or men whose disablement has been caused or aggravated by service, are not to be notified for review until a year has elapsed from the time when they left the service or were discharged, and a man who on presenting himself is rejected cannot again be notified for six months from the former notice. Restoration to military rank is granted to officers or warrant or noncommissioned officers who are accepted again for service under this act. Certain other limitations were engrafted on the original bill as introduced in the Commons. The original power to call up these excepted men for re-examination cannot be exercised within six months of the last rejection or discharge unless the Army Council specially direct otherwise on some ground of fraud and in the same way protection from re-examination is afforded to men for the time being engaged in agriculture or work of national importance, and who were engaged on such work on the 31st March last. A further protection is given in favor of officers and men where the disablement is certified to be due to wounds or gas injury sustained in battle or in any engagement, or in consequence of neurasthenia or allied functional nerve disease, if so certified by a special medical board to be the result of service in this war. Any such man can, however, offer himself for re-enlistment and be accepted. Another benefit is given to the men notified under this act for review. If they are men who have voluntarily attested and who have been rejected, but not discharged, they are to have the same rights of appeal under the Military Service Act 1916 as a man has who under this new act is served with a notice calling on him to submit himself for examination. When a man is rejected on the ground that he is permanently and totally disabled he is to receive a final discharge, and where such a man can show that his disabilities render him incapable of military service, then, like the man who does not receive notice at all, he cannot be punished for noncompliance with its terms.

MINOR BRONAUGH.

## Cases of Interest

DISBARMENT OF ATTORNEY FOR FORGERY COMMITTED IN INDIVIDUAL CAPACITY.—State *v.* Weber (La.) 75 So. 111, holds that the jurisdiction of the Louisiana Supreme Court to disbar is limited to cases of professional misconduct, and that it has no power to disbar an attorney for forgery in his individual capacity. The opinion of the court reads in part as follows: "The jurisdiction of this court for disbarment is limited to cases of professional misconduct. In committing the forgery in question the defendant appears to have been acting for himself in his individual capacity, and in no way, shape, or form as a lawyer, or in his professional capacity. This court has therefore no jurisdiction of the case."

LIABILITY OF PERSONS OPERATING AUTOMOBILE FOR INJURIES TO BOY PLAYING FOOTBALL IN STREET.—The care required of persons operating an automobile towards boys playing football in a street, and the corresponding care which the boys must exercise, receive careful consideration in Dervin *v.* Frenier (Vt.) 100 Atl. 760. The action was for damages for injuries resulting to a boy of sixteen years of age, who was run over by an automobile while playing football in a city street. A judgment for the plaintiff was reversed on the question of liability. The value of the case as an authority consists in the following summing up of liability by the court as follows: "If the plaintiff was making an improper use of the street, this fact did not relieve the defendants of the obligation of exercising due care. They saw him, and they were thereafter bound to proceed with that measure of caution that a careful man who faced such a situation would exercise. . . . True it is that streets and highways are not established for playgrounds, and such use of them is not to be encouraged; but children always have and always will put them to that use to some extent, and they do not thereby become outlaws or trespassers, or necessarily forfeit their rights therein as travellers. . . . He [the plaintiff] had a right to assume that an autobomile driver would exercise the care the law requires of him, and that he would be given some warning before he was run down. He might have done more for his own protection, but it was for the jury to say whether he did enough to answer the requirements of the prudent man rule."

VALIDITY OF STATUTE RESTRICTING RIGHT TO REDEEM TRADING STAMPS.—The Massachusetts Supreme Court being requested by the state Senate to give their opinion regarding the validity of proposed acts declaring trading stamps redeemable by any one other than the vendor to be illegal, answered In re Opinion of the Justices (Mass.) 115 N. E. 978, that such acts would if enacted be unconstitutional. The reasoning was as follows: "In 1911 the Justices were asked their opinion on the question whether a bill in effect forbidding the use of trading stamps, no matter by whom they were to be redeemed, would be constitutional. The answer was in the negative. Opinion of Justices, 208 Mass. 607, 94 N. E. 848. That opinion was in accord with the almost uniform current of authority as shown by decisions in numerous states where the question had arisen. We see no reason to change the opinion there expressed. The two proposed acts, upon which our opinion now is asked, declare trading stamps redeemable by the vendor alone, to be legal, and those redeemable by any one other than the vendor, to be illegal. The question now asked of us in view of the Opinion of Justices, 208 Mass. 607, 94 N. E. 848, in substance is whether such a distinction can be made. We are of opinion that no such distinction can be made under the Constitution. . . . The Supreme Court of the United States has determined in Rast *v.* Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679; Tanner *v.* Little, 240 U. S. 369, 36 Sup. Ct. 379, 60 L. Ed. 691; Pitney *v.* Washington, 240 U. S. 387, 36 Sup. Ct. 385, 60 L. Ed. 703, that statutes in essence like those referred to in the questions do not conflict with the provisions of the Fourteenth Amendment of the Constitution of the United States. But the question whether a statute is in conflict with the provisions of the Constitution of this commonwealth is a question upon which the decision of the Supreme Judicial Court of this commonwealth is final."

RIGHT OF PARENT TO DAMAGES RESULTING FROM BETRAYAL OF DAUGHTER.—The doctrine was announced in Kaufman *v.* Clark (La.) 75 So. 65, that no action would lie for damages result-

ing from injury to the feelings of one person by reason of injuries alleged to have been inflicted upon the person, character, or feelings of another, still living; hence, a parent could not maintain an action for injury to her feelings resulting from the betrayal of a daughter, still living. The court in an opinion by Monroe, C. J., stated the facts and conclusions reached as follows: "Plaintiff, authorized by her husband, brings suit for damages, alleged to have been sustained by her by reason of defendant's having had sexual intercourse with her daughter, a girl under the age of 16 years. It is alleged that the two acts complained of were committed, the one, at or near the 'Country Club,' and the other, at or near, 'Camp Stafford,' in the vicinity of Alexandria. The injury of which plaintiff complains is 'the violation of the rights and sanctity of her home,' and 'the great humiliation, shame, mental anguish, and degradation' that has been brought upon her; the allegation being that those consequences have been visited upon plaintiff whether defendant used force or persuasion in his relations with her daughter. The suit was dismissed upon an exception of no cause of action, and the appeal has been brought up by plaintiff. She had studiously refrained from alleging injury to herself by reason of loss of service from her daughter, upon which theory, alone, actions of this character are sustained at common law. [Citing among other authorities Ann. Cas. 1912D, p. 299.] This suit, as brought, for humiliation, etc., inflicted upon one person, by reason of something that has been done to another, still living, has no foundation either at common law or under our system."

LIABILITY OF WATER COMPANY TO CONSUMER FOR INJURIES FROM TYPHOID GERMS.—In Hamilton *v.* Madison Water Co. (Me.) 100 Atl. 659, which was an action by a consumer of water for injuries from typhoid germs in water supplied by a private water company, there was a judgment for the plaintiff. The duty of a water company in such a case was stated as follows: While a private water company furnishing water to a town is not a guarantor of the purity of its water or of its freedom from infection, it is bound to use reasonable care in ascertaining whether there is a reasonable probability that its water supply may be infected with a communicable disease from causes which are known to exist, or which could have been known or foreseen by the exercise of such care; and if the exercise of such care would have disclosed a reasonable probability of such infection, then it becomes the duty of a water company to adopt whatever approved precautionary measures are, under the circumstances of the case, reasonably proper and necessary to protect the community which it serves from the risk of infection. It was held that the consumer's burden of proof as to source of disease was satisfied by showing facts and circumstances from which it reasonably appeared that the drinking of the water was a probable efficient cause of the fever. The court said: "The defendant argues that everything which has been described with regard to the possibility of pollution from different sources was as apparent to the plaintiff as to the defendant, and imposes the same want of due care upon the one as the other. Not so. The two parties were not on a parity. The plaintiff was not in law held to such strict account as the defendant. It is no part of the duty of the consumer to investigate the water supply and ascertain sources of pollution. That duty rests on the water company together with the further duty of taking such positive action as is necessary for the protection of its customers. It cannot shift these obligations to the shoulders of the plaintiff. While therefore the doctrine of contributory negligence obtains in this class of cases, as in all other of actionable negligence, its enforcement depends upon the peculiar facts and circumstances of each case, and these facts and circumstances must be weighed in the light of the relations between the parties."

AUTHORITY OF MUNICIPALITY TO IMPOSE LICENSE TAX ON GOLF COURSES.—That the game of golf is not subject to the exercise of the police power of a municipality is the holding in the case of Condon *v.* Village of Forest Park (Ill.) 115 N. E. 825, wherein the Supreme Court affirmed a decree of the court below in favor of the complainant who sought to enjoin the village of Forest Park from attempting to enforce a village ordinance imposing a license tax on golf courses. Cartwright, J., for the court said: "The police power of the state extends to the protection of the lives, health, comfort, and quiet of all persons and the protection of all property within the State. In the exercise of that power the General Assembly may suppress and prohibit any practice, trade, or business endangering the public welfare and safety or may regulate any business in such manner as may be necessary for the safety, morals, and welfare of the people and may delegate that power to municipalities. It is for the courts to determine what are the subjects for the exercise of the police power and to determine whether an attempted exercise of the power in a particular instance is reasonably necessary to the comfort, morals, safety, or welfare of the community, and the power is restricted by those provisions of the Constitution which forbid unequal laws or an arbitrary invasion of personal rights of property. To sustain an act or ordinance under the police power the court must be able to see that it tends in some degree to the prevention of offenses or the preservation of the public health, morals, safety, or welfare. If it is manifest that a statute or ordinance has no such object, but under the guise of a police regulation is an invasion of the property rights of the individual, it is the duty of the court to declare it void. . . . The game of golf is a healthful and harmless recreation of the same class as lawn tennis and other like games, which do not attract crowds or tend to disorder or call for police supervision or regulation. It has never been known to affect in any injurious way the public health, order, safety, or morals. The fact that the game has attractions which induce players to practice it does not change its character to an amusement or entertainment provided for the public. It is not a subject for the exercise of the police of the police power."

VALIDITY OF STATUTE PROVIDING FOR PAYMENT OF STATE MILITIA FOR SERVICES ON MEXICAN BORDER.—A statute passed by the South Dakota Legislature providing for the payment of the Fourth South Dakota Infantry at the rate of $75 per soldier for services rendered on the Mexican border and appropriating from the general fund of the state what was necessary to make the payment was upheld as valid in State *v.* Handlin (S. D.) 162 N. W. 379, wherein the court said: "It is the contention of the auditor that the enactment is void in that it conflicts with each of the following sections of our state Constitution: Section 9, art. 11; section 3, art. 12; and section 1, art. 13. Section 9, art. 11, provides that: 'No indebtedness shall be incurred or money expended by the state, and no warrant shall be drawn upon the state treasurer, except in pursuance of an appropriation for the specific purpose first made.' The specific contention is that at the time the services were performed and the obligation to pay therefor was incurred no appropriation for that purpose had been made. If section 9, art. 11, was the only section in the Constitution relating to public indebtedness and the incurring and payment thereof,

then there might be some possible merit in the contention. We are of the view, however, that all three of the said sections of the Constitution relate to the subject of the incurring and payment of public indebtedness, and that these sections of the Constitution must be construed and read in the light of each other. Section 3, art. 12, provides that the Legislature shall never grant any extra compensation to any public officer, employee, agent, or contractor after the services shall have been rendered, or the contract entered into, nor authorize the payment of any claims created against the state, under any agreement or contract made without express authority of law; provided, however, that the Legislature may make appropriations for expenditures incurred in suppressing insurrection or repelling invasion. Section 1, art. 13, provides that neither the state, nor any county, township, or municipality shall loan or give its credit or make donations to or in aid of any individual, association, or corporation, nor pay or become responsible for the debt or liability of any individual, association, or corporation; provided, that the state may assume or pay such debt or liability incurred in time of war for the defense of the state. As will be observed, the concluding proviso of section 3, art. 12, as well as the concluding proviso of section 1, art. 13, contemplates and authorizes appropriations after the rendition of the services and after incurring of the indebtedness. Insurrection, invasion, and time of war are conditions that may come upon us very quickly, and it would be extremely impractical and cumbersome, in many cases, to call together the Legislature in order to first make an appropriation for expenses that might be incurred under such conditions. We are therefore of the opinion that the builders of our Constitution had in view circumstances similar to those that now exist in this case when they created these concluding provisos to these two sections of the Constitution permitting appropriations after the incurring of the indebtedness. It will be observed, also, that section 3, art. 12, provides that payment shall not be made of any claim under any contract or agreement, unless such contract or agreement was expressly authorized by law. The act in question is itself a law expressly authorizing this appropriation."

DELAYING TRAIN FOR OVER TWO HOURS TO ACCOMMODATE SCHOOL GIRLS ATTENDING CONCERT AS ENTITLING PASSENGER ON TRAIN TO PUNITIVE DAMAGES.—The case of Illinois Cent. R. Co. v. Hawkins (Miss.) 74 So. 775 is a warning to railroad superintendents whose efforts to accommodate one portion of the traveling public by allowing departures from the train schedule to bring discomfort and suffering to another portion. The action was brought by a young lady to recover damages alleged to have been sustained on account of the "wanton, wilful, negligent, and reckless conduct" of defendant railroad company in failing to transport her from Vaiden to Holly Springs, Miss., on schedule time, on one of its local passenger trains. The facts in the case appeared to be that Miss Hawkins, the plaintiff, desired to go from Vaiden, by way of Holly Springs, to Atlanta, and she inquired through her uncle of the agent of the defendant railroad at Vaiden about the train connections with the Frisco Railroad at Holly Springs, and was informed by the agent that she would make connection with the Frisco train at Holly Springs for Atlanta by traveling on one of the defendant's local trains. She boarded defendant's passenger train at Vaiden at 4.35 P.M. with the expectation of reaching Holly Springs at 8.35, in accordance with the published schedule and the information given her by the agent, and would make connection there with the Frisco train going to Atlanta at 10.40 P.M. After she delivered her ticket or mileage to the conductor, and informed him of her desire and expectation to make the connection at Holly Springs for Atlanta, the train arrived at Oxford, where, by order of the superintendent of the railroad, it was detained for about 2 hours and 30 minutes for the purpose of waiting for and receiving a number of school girls as passengers for Holly Springs. On account of this delay at Oxford, the train did not arrive at Holly Springs until after the Frisco train had left for Atlanta. Plaintiff was compelled to remain in the depot hotel at Holly Springs during the night, and departed for Atlanta at 9.35 A.M. next day. She complained that she had to pay her hotel bill, and spent a sleepless and troubled night, suffering much nervousness, and subsequently had a week's illness after arriving at Atlanta. She claimed also that she suffered greatly in body and mind in having to stay at the hotel alone, as she was not accustomed to traveling alone, and that her situation was uncomfortable and fearful to her, and resulted in much mental suffering, accompanied with subsequent illness. On these facts judgment was entered for the plaintiff for $800, actual and punitive damages, and this was affirmed on appeal, the opinion written by Judge Holden being in part as follows: "It is clear to us that the appellant railroad company was guilty of willful wrong, in this: That it knowingly and intentionally delayed the train at Oxford 2 hours and 30 minutes, when it was under contract and public duty to the appellee to transport her from Vaiden to Holly Springs on reasonable schedule time. This conduct amounts to willful neglect of duty. Vicksburg Co. v. Marlett, 78 Miss. 872, 29 South. 62. It is true that all of the agents and servants of the appellant railroad company were courteous toward the appellee, but the willfulness which warrants the infliction of punitive damages in this case consists of the treatment she received by being intentionally and willfully delayed at Oxford. Yazoo, etc., R. Co. v. Hardie, 100 Miss. 148, 55 South. 42, 967, 34 L. R. A. (N. S.) 740, 742, Ann. Cas. 1914A 323. A common carrier cannot willfully disregard the rights of a passenger, in order to accommodate other persons intending to become passengers by delaying a passenger train the unreasonable time of 2 hours and 30 minutes. 4 R. C. L. 1068, 1069. And even though the motive of the railroad superintendent was good, still the duty he owed appellee was before him, and he knowingly and intentionally violated it, and must suffer punishment in damages for the result. The case being one that justifies the infliction of exemplary damages, recovery for mental pain and suffering, shown by the evidence, was proper."

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"The stranger merely residing in a country during peace, however long his stay, and whatever his employment, provided it be such as strangers may engage in, cannot, on the principles of national law, be considered as incorporated into that society, so as, immediately on a declaration of war, to become the enemy of his own." Marshall, C. J., The Venus, 8 Cranch 291.

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"If it be admitted that humanity, Christianity, and the usages and rules observed by all civilized nations (which constitute public law), forbid even in war the use of certain means, the discussion whether such rights abstractly exist, would seem to be a disputation savoring rather of the subtlety of the schools than of that practical sense which seeks to discover and establish the actual rules by which nations in a state of war are governed." Wayne, J., U. S. v. Castillero, 2 Black 368.

# News of the Profession

RETIRED JUSTICE DEAD.—Judge Rollin H. Person, formerly a justice of the Michigan Supreme Court, died at Lansing, Mich., on June 2, aged 67 years.

APPOINTED TO PROBATE BENCH.—Governor Cox of Ohio has appointed Otto J. Boesel probate judge of Auglaize county, to succeed James O. Kridler, deceased.

SOUTH DAKOTA JUDGE RESIGNS.—George W. Crane, judge of the municipal court of Aberdeen, S. Dak., has resigned from the bench to resume the practice of law.

MADE DEAN OF LAW SCHOOL.—Attorney Alfred B. Benedict of Cincinnati, O., has been appointed dean of the Cincinnati Law School, to succeed Judge Robert C. Pugh, resigned.

NEW COUNTY JUDGE IN ARKANSAS.—Governor Brough of Arkansas has appointed James A. Thomas of Morgantown to the bench of the county court of Van Buren county, to succeed B. G. Smith, resigned.

NAMED INSURANCE COMMISSIONER.—W. H. Tomlinson, an attorney of Dayton, and head of the blue sky division of the state banking department, has been appointed state insurance commissioner by Governor Cox of Ohio.

NOTED INDIANA LAWYER DEAD.—James K. Ewing, formerly judge of the Indiana Circuit Court, and prominent for many years in Indiana political and legal circles, died at Greensburg, Ind., on May 27, aged 74 years.

PROMINENT MICHIGAN LAWYER DEAD.—Charles Artemas Kent, for more than half a century a leader of the Michigan bar, and in former years a professor of law at the University of Michigan, died at Detroit, Mich., on May 7, aged 81 years.

APPOINTED TO UNITED STATES SENATE.—Governor Withycombe of Oregon has appointed C. L. McNary, of Salem, formerly a justice of the Oregon Supreme Court, to succeed the late Harry Lane as United States Senator for Oregon.

DEATH OF PROMINENT LOUISIANA LAWYER.—Harry Hill Price, judge of the First City Court of New Orleans for many years, and one of the oldest and most prominent members of the Louisiana bar, died at New Orleans on May 17, aged 75 years.

DEATH OF FORMER HAWAIIAN LAWYER.—Edgar Caypless, former Mayor of Honolulu, political adviser to ex-Queen Liliuokalani of Hawaii and well known in former years as a criminal lawyer, died at Denver, Colo., on June 8, aged 70 years.

NEW UNITED STATES ATTORNEY IN LOUISIANA.—Joseph H. Moore of Lake Charles has been appointed United States district attorney for the Western district of Louisiana, to succeed George W. Jack, recently appointed to the Federal District bench.

MADE HEAD OF CIVIL SERVICE COMMISSION.—Albert D. Early of Rockford, until recently the president of the Illinois State Bar Association, has been named as chairman of the Illinois State Civil Service Commission, succeeding James H. Burdette of Chicago.

DEATH OF FORMER SENATOR FORAKER.—Joseph Benson Foraker, former United States Senator from Ohio, lawyer, orator, and soldier, died at Cincinnati, Ohio, on May 10, aged 70 years. Mr. Foraker served in the Civil War, was elected Governor of Ohio in 1885 and again in 1887, and became United States Senator in 1897, serving two terms.

JUSTICE OF LOUISIANA SUPREME COURT DEAD.—Alfred D. Land, a member of the Louisiana Supreme Court since 1903, died at New Orleans, La., on June 4, aged 76 years. Judge Land served throughout the Civil War, was admitted to the bar in 1865, and served as District Judge from 1894 until his elevation to the supreme bench.

APPOINTED TO SUPREME BENCH OF PHILIPPINES.—President Wilson has appointed George Arthur Malcolm, of Manila, to be an associate justice of the Supreme Court of the Philippine Islands. Judge Malcolm is a graduate of the University of Michigan and at the time of his appointment to the bench was dean of the law school of the University of the Philippines.

WOMEN LAWYERS FORM BAR ASSOCIATION.—The women lawyers in Washington, D. C., have organized a Woman's Bar Association for the District of Columbia. The following officers have been elected to hold office until October 15: President, Mrs. Ellen Spencer Mussey; Vice-president, Miss Ruth Halpenny; Secretary, Miss Laura Berrien; Treasurer, Miss Clara Graecen.

THE ILLINOIS STATE SOCIETY OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY held its sixth annual meeting at Danville, Ill., on June 1, in connection with the session of the Illinois State Bar Association. The feature of the meeting was an address by Dean H. W. Ballentine of the University of Illinois on "A Brief Review of Cases in the Supreme Court During the Past Year."

DEATH OF INDIANA JUDGE.—Daniel W. Comstock, Member of Congress from Indiana, died at Washington, D. C., on May 19, at the age of 77 years. Mr. Comstock served during the Civil War with distinction, and was commander of the G. A. R. Department of Indiana for 1913. He was a judge of the Indiana Circuit Court for two terms and sat on the bench of the Indiana Appellate Court from 1896 to 1911.

FAMOUS ART COLLECTION GIVEN TO PEOPLE.—Through the will of the late John G. Johnson, Philadelphia comes into possession of the lawyer's famous art collection valued by him at more than $5,000,000. There are 1500 numbers in the collection which is declared to be approximately as large as the galleries of Munich and Vienna. The collection illustrates the whole course of European painting better than that in any other American gallery.

LOUISIANA BAR ASSOCIATION.—At its recent annual convention held in Alexandria, La., the Louisiana Bar Association elected the following officers: President, George H. Terriberry, New Orleans; Vice-presidents, First district, Walter L. Gleason, New Orleans; Second district, Judge J. C. Pugh, Shreveport; Third district, Charles A. McCoy, Lake Charles; Fourth district, I. D. Wall, Baton Rouge; Secretary and Treasurer, Wynne G. Rogers, New Orleans.

WISCONSIN BAR ASSOCIATION.—The annual convention of the Wisconsin Bar Association was held at Madison, Wis., on June 27 and 28. The program included addresses by the president, D. H. Goggins of Grand Rapids, by C. B. Bird of Wausau, by Moses Hooper of Oshkosh, by Harry Olson, Chief Justice of the Chicago Municipal Court, on "Disease and Crime," and by W. S. Carter, president of the Brotherhood of Locomotive Firemen, on "Are the Present Aims of Organized Labor Contrary to Public Policy?"

VETERAN ATTORNEY AND BALL PLAYER DEAD.—J. William Johnson, one of Cincinnati's oldest attorneys, died at that city on June 5, aged 75 years. Mr. Johnson was one of the organizers of the original Red Stocking baseball team of Cincinnati. As a player in 1869 he was awarded the Clipper prize for making the most runs in one season, and was regarded as one of the fastest baserunners in the country. During his later years Mr. Johnson served as Vice-president of the Western and Southern Life Insurance Company.

DEATH OF FORMER ATTORNEY-GENERAL.—William Henry Harrison Miller, attorney-general of the United States under Benjamin Harrison, died at Indianapolis, Ind., on May 25, aged 76 years. During his term as attorney-general among the better known cases in which he took part was what was known as the Terry case, which resulted from David S. Terry, a California lawyer, being killed by a deputy United States marshal; the Bering Sea litigation; the question of the constitutionality of the McKinley tariff law; and the interstate and anti-lottery laws. While appearing in cases in the federal court he became acquainted with Gen. Benjamin Harrison, and a few years later became a member of the firm of Harrison, Hines & Miller. When Gen. Harrison became president he made his partner a member of his cabinet.

GEORGIA BAR ASSOCIATION.—The thirty-fourth annual meeting of the Georgia Bar Association was held at Tybee, Ga., on May 31, June 1 and 2. The official program included the following: President's address, by William H. Barrett of Augusta; annual address, by Henry St. George Tucker, of Lexington, Va.; papers by J. E. Hall of Macon, L. C. Hopkins of Atlanta, and William M. Howard of Augusta; discussion of the question "Should Governmental Control of Quasi Public Corporations Be Extended?" by Millard Reese of Brunswick, C. E. Dunbar of Augusta, H. A. Hall of Newnan, and T. S. Hawes of Bainbridge; discussion of the question "How Can the Growth and Usefulness of the Georgia Bar Association Be Promoted?" by F. T. Saussy of Savannah, P. H. Doyal of Rome, F. Holmes Johnson of Gray, E. T. Moon of La Grange, Lloyd Cleveland of Griffin, C. P. Grantham of Thomasville, W. C. Lattimer of Atlanta, J. R. Phillips of Louisville, and Hal Lawson of Abbeville.

ARKANSAS STATE BAR ASSOCIATION.—As stated in LAW NOTES for June, the Arkansas State Bar Association met in annual session at Hot Springs, Ark., on May 31 and June 1. The address of the president of the association, Charles C. Reid of Little Rock, was on the subject "The Legislative Department." Other addresses and papers were as follows: "Efficiency of the Executive Department," by Governor Brough of Arkansas; "The Judicial Department," by W. V. Thompkins of Prescott; "The Revenue System," by J. F. Loughborough of Little Rock; "The County Organization," by J. H. Carmichael of Little Rock; "The City Management," by T. M. Hooker of Pine Bluff. At the annual banquet, Joseph M. Stayton of Newport acted as toastmaster and the following toasts were responded to: "True to Tradition," by Harry Myers of Little Rock; "Equality," by Mrs. T. T. Cotnam of Little Rock; "The Young Lawyer," by C. E. Daggett of Marianna; "Vapors," by L. E. Sawyer of Hot Springs; "Bone Dry," by D. L. King of Lewisville.

ILLINOIS STATE BAR ASSOCIATION.—The forty-first annual meeting of the Illinois State Bar Association was held at Danville, Ill., on May 31, June 1 and 2. The principal topic for discussion was "Reorganization of the State Judiciary under the New Constitution." A. D. Early of Rockford delivered the president's address. Among the other addresses were the following: "The Lawyer's Call," by John De Witt Warner of New York; "The Reform of Criminal Procedure," by Robert W. Millar of Northwestern University; "The Need and Contents of a New Constitution in Illinois," by Nathan W. MacChesney of Chicago; "Judicial Organization," by Judge Harry Olson, Chief Justice of the Chicago Municipal Court. A resolution denouncing ex-Senator Works of California for recent unpatriotic utterances concerning the war, was adopted unanimously, and forwarded to President Wilson. At the annual banquet, the chief speaker was Governor Arthur O. Stanley of Kentucky. The following officers were elected: President, Edgar B. Tolman of Chicago; Vice-president, Walter M. Provine of Taylorville; Secretary, R. Allen Stephens of Danville; Treasurer, Franklin L. Velde of Pekin; Directors, C. H. Buntain, Ernest L. Kraemer, and Bruce A. Campbell.

JOSEPH H. CHOATE DEAD.—Joseph H. Choate, former United States ambassador to Great Britain, died at New York City on May 14, at the age of 85 years. Mr. Choate, notwithstanding his advanced years, had taken an energetic part in the entertainment to the French and British war envoys, and these activities unquestionably hastened his death. Mr. Choate was one of the most distinguished practitioners of law in the United States. His father was a cousin of the famous Rufus Choate. He was graduated from Harvard in 1852, a college mate of Phillips Brooks. He established himself in New York in 1856, soon after finishing his law studies, and as a member of the firm of Evarts, Southmayd & Choate he rose to leadership of the New York Bar. He appeared in all the celebrated cases—it was said a case was not a case unless Choate appeared in it—where his fluency and wit and searching cross-examination brought him considerable success. He figured in the prosecution of "Boss" Tweed and his followers, who looted the New York City treasury; he so successfully defended General Fitz-John Porter that by reversal of a court-martial that officer was reinstated; he appeared in the Tilden will case, the contest over Commodore Vanderbilt's millions, and the Chinese exclusion case, arguing against the validity of the act. His professional income during the height of his career was believed to be the largest of any practitioner in the American courts.

## English Notes

AN OLD LAW SUIT.—A law case which was begun in 1348 and was interrupted because Richard de Maundeville had to leave for the war in France was resumed recently in the Chancery, says the *London Express*. The point at issue was the right to hold a market at Stowmarket, Suffolk, and the suit was originally brought by the Abbot of St. Osyth, Essex, in the twenty-second year of Edward III, against Richard de Maundeville. According to the Abbot, who claimed to be lord of the manor, Richard had wrongfully obtained the grant of the right to hold a market in Stowmarket, and his claim was "to the grave damage of the said Abbot." Richard claimed the King's protection, and eventually the case was adjourned sine die because of his departure abroad.

ENGLISH LAW BOOKS IN FOREIGN COUNTRIES.—Professor F. P. Walton, who is a member of the Scots Bar, but who, since

1897, has been the occupant of the Roman Law Chair at McGill University, Montreal, has had the compliment paid him of having his Introduction to Roman Law translated into Portuguese and adopted as the recognized text-book on the subject in the legal curriculum in Brazil. It is doubtful whether the work of any English writer on Roman law has been similarly honored. English law books are, of course, practically limited as regards circulation to those countries where English jurisprudence has been adopted, and we have not heard of any English treatise being adopted as a text-book in a foreign court, but there are instances of some English standard text-books being translated into other tongues. Thus, Abbott's Law of Shipping was at an early date in its history translated into Portuguese, and, more recently, Professor Dicey's Law of Domicil was translated into French by a distinguished member of the Brussels Bar. Instances of this have not been common, and the few there are form a striking testimony to the value attached by foreign jurists to the particular treatises.

CORONERS' JURIES.—The fact that the exigencies of the times have affected in some degree the circumstances which surround what Lord Campbell described as "a very ancient and important office" is eloquent in itself of the extraordinary manner in which every department of the national life is being ousted from its customary groove. The coroner and the sheriff are still the most important figures in the county in civil matters, although the former has lost some of the wider authority with which he was clothed in mediaeval times. The Coroners (Emergency Provisions) Bill is the latest addition to the changes which have been introduced in regard to their juries. In former days the jury consisted of thirty-two persons, of whom twelve represented the hundred, and there were in addition five representatives apiece for the four neighbouring vills. Nowadays the procedure has been regulated by the consolidating Coroners Act of 1887, and by section 3 (1) "not less than twelve nor more than twenty-three good and lawful men" are by warrant summoned to appear before the coroner for the discharge of their duties. By sub-section 3 the coroner is enjoined, when not less than twelve jurors are assembled, to swear them to inquire concerning the death and true verdict to give according to the evidence. In section 4 (5) there is a power to adjourn the inquest to the next sessions of oyer and terminer or gaol delivery if twelve at least of the jury do not agree. If, after the jury have heard the charge of the judge or commissioner holding such sessions, twelve of them fail to agree on a verdict, the jury is discharged. It would seem, however, that the coroner has a common-law remedy for dissentient jurors in the exercise of detention as long as he likes, and by adjournment from one locality to another until they manage to find a common platform. The present dearth of men has drawn attention to the practical difficulties in obtaining from twelve to twenty-three jurors. The Government Bill which has gone through the Commons and is now before the Lords, proposes to ease the difficulty during the continuance of the war, and for six months subsequent to its close, by reducing the minimum number of twelve to that of seven, and the maximum number of twenty-three to that of eleven.

LIABILITY IN RESPECT TO FALLEN TREES.—On so dubious a question as that which was raised in the recent case of Hudson *v.* Bray (116 L. T. Rep. 122), with practically no authority to assist in its decision, it is not easy to form any definite opinion whether a correct conclusion was arrived at by the learned judges of the Divisional Court (Justices Ridley and Avory). Although it would be placing a burden on an occupier of land which, in justness, he ought not to bear, to render him liable for damages in such circumstance as occurred in that case, yet the alternative is far from satisfactory. It appears to have been conceded that it was the duty of the surveyor of highways to remove or to see to the removal of the obstruction caused by the tree blown down by the gale. And the court seems to have taken the view that the defendant would have been under a duty to furnish a lamp to light the tree if requested to do so by that official. Moreover, if the defendant, after receiving a notice from the surveyor of highways calling on him to remove the tree, had failed to remove it within a reasonable time, he would, in the opinion that was expressed by Mr. Justice Avory, have been guilty of wilful obstruction under section 72 of the Highway Act 1835 (5 & 6 Will. 4, c. 50) as interpreted in Gully *v.* Smith (10 Q. B. Div. 121). Notwithstanding that the appellant in that case had not himself done any act of obstruction, an omission to remove an obstruction after notice to remove it was held to amount to wilful obstruction under section 72 of the Act of 1835. But the question in the present case turned more on the construction of section 65 of that Act. The defendant's obligation to remove the tree within a reasonable time after notice to do so is one thing. His duty, before receiving such notice, to guard and light the tree until its removal could take place, so that it should not be a trap to passengers along the highway, which otherwise it undoubtedly would not fail to be, is another thing altogether. It would involve that every occupier of land should institute a continuous search over the whole of his property throughout a gale in order to ascertain whether any trees have been blown across the highways contiguous thereto. His obligation would then, as was remarked by Mr. Justice Ridley, "be increased to a point which would be intolerable." On the other hand, if the risk to passengers is to be left unremedied until the surveyor of highways has had the opportunity of surveying every highway in the district under his control, and of notifying of obstructions thereon, the position is even more perilous to those using the highway. It is a choice of evils—which is the more serious of the two.

IMPERFECT DIAGNOSIS OF INJURED WORKMAN'S AILMENT.—Although occurring in widely diverse circumstances, two of the workmen's compensation cases recently reported showed features that were singularly in common. We refer to the cases of Bower *v.* Meggitt and Mills *v.* Dinnington Main Coal Company Limited (116 L. T. Rep. 178, 181). And in each complete failure to diagnose accurately the nature of the injury from which the workman was suffering as the result of an accident to him gave rise to the question which the Court of Appeal was called on to determine, a question that doubtless frequently happens in cases of this description. For erroneous hospital treatment, equally with private medical treatment, will not be eliminated while *humanum est errare* is a true statement. And that must be so long as the human race continues to exist. In the former of those cases, the immediate result of the accident to the workman proved to be a fracture within the joint of the knee—viz., of the outer condyle of the femur. But it was not until an examination under the X-rays became available that the precise effect of the injury to the workman's knee was discovered. Previous to that examination the workman was treated at a hospital on the assumption that no actual fracture had been caused to his knee, but that he suffered from anthritis, as being the natural result of an injury such as that which he had sustained. Was there *novus actus interveniens* in consequence of the mistaken treatment at the hospital? If that could be established, the chain of causation would be broken, and a change of circumstances be manifested of such a trend

as to deprive the workman of his right to compensation. For if a different treatment had originally been resorted to at the hospital, a different state of things would have resulted. The onus lay on the employers to prove that change of circumstances, not on the workman to prove that his then condition resulted from the accident and not from some intervening cause. That proposition was enunciated in Marshall *v.* Orient Steam Navigation Company Limited (101 L. T. Rep. 584; (1910) 1 K. B. 79); and it was applied in the present case. In Mills *v.* Dinnington Main Coal Company Limited, the other case heretofore referred to, a workman suffering from osteo myelitis, an inflammatory condition of the marrow of the bone, was wrongly treated by the doctor on the supposition that he was suffering from contusion of the tissue of, and possibly of the bone in, his thigh. Being an extremely obscure disease and particularly rare among adults, it is not surprising that it required a specialist to diagnose osteo myelitis and septicæmia, rendering indispensable an operation forthwith to remove the marrow of the bone. Owing to this misconception of the workman's real injury, notice of the accident was not given to the employers "as soon as practicable after the happening thereof," as directed by sect. 2, sub-sect. 1, of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58). But inasmuch as the employers were not thereby "prejudiced in their defense," the delay in the notice was regarded by the court as immaterial. In future cases where the medical treatment has been faulty, these two cases will probably be found useful as guides to their decision.

THE HOUSE OF LORDS AS AN APPELLATE COURT.—Lord Buckmaster, in his speech on the second reading of the Titles, etc., Held by Enemies Bill, referred to the fact that the House of Lords in its appellate capacity sits for the determination of all legal matters as a full House to which every peer is still at this day entitled to come and attend the hearing of the final appeals before the House of Lords. "It must, however," he said, "be a very long time since any peer has attempted to invade this House when it was engaged in the absorbing question of law matters." Lord Brougham, writing in 1861, says: "Every English peer on attaining the age of twenty-one years has as much a voice in all these great questions (coming before the House of Lords in their appellate jurisdiction) as the Lord Chief Justice of England or the Lord Chancellor himself. . . . In practice, however, all is quite different. The usage is for all but the few Law Lords to abstain from taking any part either in questions of appeal from courts of equity or writs of error from courts of law, or in cases of peerage claims which are regarded as questions of private right." The right of peers to vote in judicial cases has been exercised on some memorable occasions. In 1685, in the case of Howard *v.* Duke of Norfolk, a decree of the Lord Keeper Guildford was reversed, after an angry debate, by a House attended by eighteen bishops and sixty-seven temporal peers. In 1689, on Titus Oates' writ of error, the judgment of the court below was affirmed by a division of thirty-five peers against twenty-three, in opposition to the unanimous opinion of the nine judges who attended. In June, 1806, in the case of Lord Hertford's guardianship of Lord Hugh Seymour's daughter, there was a large attendance of lay peers. In the writ of error of Reg. *v.* O'Connell, in 1814, a discussion arose in which some of the lay Lords seemed inclined to exercise their right, but abstained from voting. On the 9th April, 1883, in the appeal of Bradlaugh *v.* Clarke, Lord Denman, a lay peer, was present, and expressed his opinion in support of the dissentient Lord of Appeal, Lord Blackburn. The Lord Chancellor, in defending the provisions of the Bill, that the committee of the Privy Council in the investigation of the cases on which to base their report are not to be bound by the laws of evidence, said that in the present instance the application of the laws of evidence may with advantage be dispensed with, as we are engaged in war and it might be difficult, if not impossible, to get the necessary legal evidence on the matters to which the attention of the committee is under the Bill to be directed. "It was," said the Lord Chancellor, "remarked by a brilliant writer that the rules of evidence exclude information on which every reasonable man would act in the most important affairs of life." Mr. Justice Fitzjames Stephen is the author of this statement. He has thus more formally expressed his views: "Four classes of fact which in common life would usually be regarded as falling within the definition of evidence are excluded from it by the law of evidence, except in certain case: (1) Res inter alios actæ; (2) hearsay; (3) opinion; (4) character." To each of these four exclusive rules Mr. Justice Stephen takes care to state that there are several important exceptions.

"ENEMY SHIPS IN PORT."—In a recent letter in the London *Times*, entitled "Enemy Ships in Port," Professor T. E. Holland, K. C., draws attention to the fact that the seizing by the United States of German merchant ships lying in their ports will raise several questions of interest, but will not come under the purview of the second Peace Conference of 1897, which produced Convention VI., relative to the status of enemy merchantmen at the outbreak of hostilities, which is signed by all the Powers represented at the conference, except the United States of America, China, and Nicaragua, although Nicaragua acceded later. Professor Holland thinks, however, that the policy of the United States has to some extent felt the influence of Convention VI. in announcing that the seizure will provisionally amount only to requisitioning. The rule as to enemy ships in port at the outbreak of war is thus succinctly stated by Mr. Hannis Taylor, the eminent American jurist, writing before the second Peace Conference: "Ships in port were formerly confiscated, but the rule now is to allow them time to finish loading and reach their home ports if they do not contain contraband." In former times, no doubt, international law empowered States at the outbreak of war to levy an embargo on all enemy merchantmen in their harbours in order to confiscate them. As regards enemy merchantmen in the harbours of belligerents, it became from the outbreak of the Crimean War in 1854 a usage, if not a custom, that no embargo would be laid on them for the purpose of confiscating them, and that a reasonable time must be granted them to depart unmolested. Article 1 of the Convention enacts that in case an enemy merchantman is at the beginning of the war in the port of a belligerent, it is desirable that she should be allowed freely to depart either immediately or after a sufficient time of grace, and after being furnished with a passport to proceed either direct to her port of destination or to such other port as may be determined. Professor Holland says that it might perhaps be argued that the English Prize Court might well have refrained from treating this section as if it were obligatory, and have founded its decisions rather on international law as supplemented by a non-obligatory custom. Professor Oppenheim clearly inclines to this view. He reminds his readers that "in coming to an agreement with reference to Convention VI. two facts had to be taken into consideration. There is firstly the fact that in all maritime countries numerous merchantmen are now built from special designs in order that they may quickly at the outbreak of or during war be converted into cruisers;

it would therefore be folly on the part of a belligerent to grant any lenient treatment to such cases. There is, secondly, the fact that a belligerent fleet cannot nowadays remain effective for long without being accompanied by a train of colliers, transports and repairing vessels; it is therefore of the greatest importance for a belligerent to have as many merchantmen as possible at his disposal for the purpose of making use of them for such assistance to his fleet." Professor Oppenheim comes to the conclusion that it is obvious, since only the desirability of free departure of such vessels is stipulated by Convention VI., that a belligerent is not compelled to grant free departure. The United States in making the seizure, not for the purpose of confiscation, but for requisitioning, as Professor Holland points out, are acting in the spirit of Convention VI. Under that convention the former usage that enemy merchantmen in the harbours of the belligerents at the outbreak of the war may not be confiscated has been made a binding rule by article 2, which enacted that such vessels as were not allowed to leave, or were by *force majeure* prevented from leaving, during the term of grace, may not be confiscated, but may only be detained under the obligation that they should be restored without indemnity after the conclusion of peace, or they may be requisitioned on condition of indemnities to be paid to the owners. The submarine campaign and its incidents give, it is obvious, a very enhanced value to the enemy ships in the harbours of belligerents, the destruction of whose merchant vessels is a cardinal object of enemy policy.

Legacy of Stock as General or Specific.—It appears to be settled law that a legacy of stock, in round numbers, though the testator may possess the exact amount of stock is not specific: (Simmons *v.* Vallance, 4 B. C. C. 345; and Robinson *v.* Addison, 2 B. 515). But where the legacy was of £2702 3s. Bank Stock, and the testator had the exact amount at the date of his will, it was held to be specific. Mr. Theobald in his Treatise on Wills (p. 150, 7th edit.), referring to that case, says: "At the present day it would probably be held that that fact ought not to affect the construction of the will." In Robinson *v.* Addison a testator having fifteen and a half Leeds and Liverpool Canal shares bequeathed five and a half such canal shares to A, five of such shares to B, and five of such shares to C. There was no description or reference in the will to show that the testator intended to give the particular shares which he held at the date of his will. At his death he possessed no Leeds and Liverpool Canal shares. It was held by Lord Langdale, M. R., that the legacies were general, and not specific. That is a strong case for showing that a court will not guess at a testator's intention. The court, however, will not be slow to draw the inference, from the contents of the will itself, that legacies of stock are specific. Thus if a will contains several obviously specific legacies of stock, and then a bequest of stock or shares, which he possessed, but which were not described in such a manner as to amount to specific bequests, the court will hold the latter also to be specific. See Re Nottage; Jones *v.* Palmer, No. 2 (73 L. T. Rep. 265; (1895) 2 Ch. 657, C. A.), in which Lord Justice Rigby in the course of his judgment said: "You have got a long way towards a specific gift if you come to the conclusion that he is trying to describe something which he has. . . . But when a man has different kinds of investments, and by his will deals with them all, dealing with some of them in such a way as to make it absolutely clear that he intended specific gifts, and with regard to all there are expressions in the will which agree better with the hypothesis that the gifts are specific than that they are general, I think we may safely conclude that the gifts of investments of particular descriptions are specific." In re Pratt; Pratt *v.* Pratt (70 L. T. Rep. 489; (1894) 1 Ch. 491) a gift by will of £800 invested in 2½ per cent. consols was held to be specific, owing to the fact that it was associated with a number of other gifts, several of which were clearly specific. In these cases the question arises how far evidence of the state of a testator's assets at the date of his will, and death, respectively, is admissible. There are two rules which are not always quite easy to reconcile —namely, (1) that the court has the right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably, and with sufficient certainty, applied (per Lord Cairns in Charter *v.* Charter, L. Rep. 7 H. L. 364); and (2) that the condition of a testator's assets ought not to be gone into and considered for the purpose of altering the meaning of language in itself perfectly clear and well applicable to definite objects in the condition of things to which the will refers: (see Higgins *v.* Dawson, 85 L. T. Rep. 763; (1902) A. C. 1). You must construe the will. If the meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon that meaning, or to give the will a different meaning. But evidence is always admissible to show what things a testator intends by a specific description—that is, to identify the thing described. By sect. 24 of the Wills Act (1 Vict. c. 26) every will is to be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. Therefore evidence of the state of a testator's assets at his death is usually admissible, and in fact generally necessary, to explain the subjects of the bequest, or the persons to whom the bequests are made.

## Obiter Dicta

Avoiding the Draft.—Lamb *v.* Cannon, 38 N. J. Law 362.

On the Western Front.—King *v.* Kaiser, 126 Md. 213.

Fruitful Litigation.—Mellon *v.* Lemmon, 111 Pa. St. 56.

A Bad Record.—The plaintiff in Record *v.* Ellis, 97 Kan. 754, was the illegitimate son of the defendant's intestate.

Unruly Holidays.—Christmas *v.* State (Tex.), 44 S. W. 175, and Easter *v.* State (Tex.), 160 S. W. 74, were both prosecutions for disorderly conduct.

A Live One.—"The cemetery in question was, to use a business expression, a going and growing concern." See People *v.* Stilwell, 190 N. Y. 291.

Reformed.—In Ex p. Cain, 39 Ala. 440, it appeared that Cain belonged to a sect of religionists having conscientious scruples against the shedding of blood.

They Come High in Illinois.—"Osborne paid Hurlburt $81,399.79 in cash for his wife, and took an assignment of the certificate from Hurlburt to himself." See Burgett *v.* Osborne, 172 Ill. 244.

ARE THERE ANY SUCH?—"We refuse to cite any authorities in support of positions that no judge ever doubted, and every lawyer is presumed to know." Per Duer, J., in Astor *v.* L'Amoreux, 6 N. Y. Super. Ct. 529.

WHICH?—"The plaintiff testified that the hole was so large that her entire foot went into it up to her ankle—that it 'was as large as a good-sized basin, wash basin.'" See Murphy *v.* New York, 142 N. Y. App. Div. 63.

SPEAKING FROM EXPERIENCE.—"The reason for an attorney asking employment is obvious and needs no question to develop it to the ordinary understanding. The attorney wants the work." Per Gray, C., in Roche *v.* Baldwin, 143 Cal. 190.

HOW LONG?—In Johnson *v.* State, 73 Tex. Crim. 133, the first paragraph of the syllabus has the following catch-line: "Carrying Pistol — Two Days — Written Pleadings — Former Jeopardy." Nevertheless, one may look in vain through the syllabi and opinion for information as to just how long the defendant carried the pistol.

WHOLESALE DISBARMENT.—"The only possible case in which a man can be personally compelled to serve [in the militia], is that of extreme poverty, or not being able to raise £10. A man, in such a case, is unfit to be an attorney, and not entitled to the protection of the court." Per Blackstone, J., in Gerard's Case, 96 Eng. Reprint 666. How times have changed since 1777!

NOT SWALLOWABLE.—"Of course such testimony to dignify it by that title, with neither knowledge nor experience on which to base it, or with which to back it, is simply worthless; neither courts nor juries are required to believe it; if they do, the esophagi of their credulities must be abnormally dilated, or else permanently enlarged." Per Sherwood, J., in Graney *v.* St. Louis, etc., R. Co., 157 Mo. 682.

THE GEORGIA CODE.—Apparently, fists and not pacifists govern in Georgia. In Rumsey *v.* Bullard, 5 Ga. App. 802, Hill, C. J., said: "All the judges of this court, being 'to the manner born,' are willing to take judicial cognizance of a fact which as individuals they all well know, that in Georgia to call a man a liar, even without raising a stick, usually provokes a breach of the peace, and most generally brings on a fight. There may be exceptions to this rule, but they are rare exotics, and find little nourishment in our southern soil and beneath our southern skies."

MUSIC HATH CHARMS ANYWHERE.—In Fields *v.* District of Columbia, 26 App. Cas. (D. C.) 70, the plaintiff in error was charged with being "a person of evil life and fame" in that he made his living by playing the piano in houses of ill fame in a malodorous part of the city of Washington commonly known as "The Division." Reversing the conviction in the trial court, Judge Morris of the Court of Appeal discoursed thus lightly and harmoniously on the subject-matter of the occupation of the plaintiff in error: "It does not appear that the learned 'professor,' who seems to have combined the pursuit of the heavenly art of music with the more mundane and prosaic occupation of delivering provisions from a grocery wagon, ever acquired fame of any kind, either good or evil, by his performances, such as Nero did who is said to have fiddled while Rome burned. And if he is designated as 'a man of evil life' because nightly, for a consideration, he dispensed the harmony of sweet sounds to admiring bands of the gentle and refined nymphs of 'The Division,' as it is called, and the fastidious guests whom they were pleased to admit to a view of their Terpsichorean performances, it might well be argued that he deserves praise rather than blame for seeking to lead his auditors from Cyprus to Parnassus, from the lascivious groves of Daphne to the purer fountains of Helicon. It is true that excessive playing of the piano has sometimes excited homicidal mania throughout a whole neighborhood; but we have no complaint that our learned 'professor' here gave cause for any such feeling among the placid denizens of 'The Division,' or in any way disturbed the peace and quiet of the place. Seriously, we do not understand how the proof of playing the piano at night in a house of ill fame in 'The Division' can convict one, especially a person of the class to which the appellant belongs, of being a man of evil life, any more than if he played that instrument in the homes of aristocracy. The act would be the same in both cases; and the locality of the performance does not in any manner qualify its character. We do not understand that the art of music is a crime in 'The Division' and an accomplishment in Belgravia. Why may we not hold the man who furnishes groceries to these dens of Cyprianism to be a man of evil life, if we are to hold as such the man who furnishes music to them? If the charge against this appellant had been that he frequented houses of ill fame, it is possible that a case of misdemeanor could have been made out against him. But the charge is not of that kind; it is that of being a man of evil life, whatever that means; and this charge may reach Belgravia as well as 'The Division.' It cannot, in reason, be supported by proof of playing the piano at night in the last-mentioned quarter of the city."

THE ONLY TIME THEY EVER AGREED?—A correspondent sends us the following amusing document copied from the records "somewhere in Alabama":

"The State of Alabama }
..... County }

Articles of agreement between Gabriel C. Ingram and Louisa M. Ingram, formerly Louisa M. French, and having married G. C. Ingram on the 26 day of July, 1855, since that time his wife, and I thought at that time as Mr. Ingram was some advanced in years that I could fill the place of a companion for him, and thereby better my condition in life, but on a test of the matter for more than four months and from the treatment I received from the family, and not being very stout myself, I found it more than I was able or willing to bear. I therefore saw proper to leave the house, which I did on the 13th day of December, 1855, with the intention never to live with him another day, and I am still in the same notion that I was when I left his house, and I no longer consider him my husband, for which cause I this day, 27 February A. D. 1856,

DELAWARE CHARTERS
IMPORTANT AMENDMENTS
TO THE DELAWARE LAW (March 20, 1917).
STOCK WITHOUT PAR VALUE
The most modern and scientific method of corporate organization. Write for full particulars of this and other important amendments.
REVISED DIGEST (4th Ed.) free to lawyers on request
CORPORATIONS ORGANIZED AND REGISTERED.
LAW AND FORMS FREE.
Corporation Company of Delaware
EQUITABLE BUILDING, WILMINGTON, DEL.

relinquish all my interest in his person and also all my dower or claim in his estate.

Given under my hand and seal, this the day and date above written Louisa M. Ingram (Seal)

his
John x McCaine
mark
Jefferson Riley, J. P.

Now this article of agreement on the part of Gabriel C. Ingram is to show that not for my pleasure but the comfort and gratification of Louisa M. Ingram my once dearly beloved wife, I do hereby rattify her above complaint and causes and for her leaving me and my house on the day and in the way she did, and for the above reasons and in these presents, I do hereby relinquish all my interest in her person, and I further authorize her to go where and when she pleases and live where she pleases all the remainder of her life, as I no longer consider her my wife no more than if though we had never been married & I also relinquish all my claim on her estate and leave her in the hands of a Holy God. I pray that he may receive her deathless spirit when it leaves that *dear* little tabernacle of clay that I once so *dearly loved.* Given under my hand and seal. Gabriel C. Ingram (Seal)

his
John x McCain
mark
Jefferson Riley, J. P.

SPIES AND SUCH.—Stevenson *v.* Harris, 238 Fed. 432, was an action to enjoin the production of a play on the ground of infringement of copyright. The opinion, written by Judge Mayer of the Southern District of New York, is so humorous and entirely readable that we regret our inability, having due regard to considerations of space, to reprint it in full. Perhaps, however, the following extract, having especial reference to the spy of fiction and the drama, may serve to illustrate the entertaining character of the opinion as a whole: "Stage and story male spies are always very villainous persons. When they are humble men, they usually have very heavy eyebrows, a stoop or slouch, and a sinister look. When they are higher up in spydom, they are well groomed and have an erect bearing, but they must also have a sinister look. Female spies usually must be handsome, or at least attractive. Sometimes they have flashing jewels, although occasionally a minor female spy, who, say, is the landlady of an inn, is permitted to be afflicted with embonpoint instead of jewels. This war added a new class of spies to fiction, and some say to real life. Persons supposed to have been kindly and inoffensive, it seems, are spies. Most of these, it appears, are in some way connected with inns. It is a sad revelation. Can it be that the kindly Teuton at the Hof in Berlin, who saw that your trunks reached America safely, was a French spy? Is it possible that the solicitous and delightful host at Dijon who recommended the juicy chateaubriand was a German spy? Is it true that the genial head of that charming half villa and half inn with the little garden covered with vines at Rudesheim, who claimed that his ancestors for more than a century had lived and died there, was in reality a Russian spy? And, finally, must we believe that the accomplished proprietor of that homelike abode in Biarritz where you are told you will be more comfortable than at the Palais, because with him you are a name and there you are a number, was not, in fact, loyal to France, but was a member of the German secret service? There was also a temporary vogue in a new kind of spy in the early days of the war. There was a congress of surgeons at Vienna attended by professional men from all over the world. Among others were some young American physicians and surgeons who affected foreign trimmed the beards and wear ordinary scarfs now, since they were exare pleased to be taken for foreigners. Some of the latter had their wish gratified; some of the former have dispensed with the beards and wear ordinary scarves now, since they were examined and, in some instances, temporarily detained by the military and police authorities of the continental countries. However, with the many incidents exploited by the press and those conjured up by the imagination of the author and the playwright, it has so happened that every well-regulated novel and war play must have a spy. Having acquired a spy, the novel and the play require that the spy must get somebody into trouble. Lost or stolen passports have long been a source of much difficulty and embarrassment. Then, of course, there must be a love affair, which, preferably, should end happily. American readers and audiences like manly American men who court danger for the sake of chivalry, and they like the courageous American girl who, by her quick wit, never fails to extricate everybody from complications after having herself created them; or there may be the charming foreign young woman whose patriotic devotion makes her insensible to danger and excites sympathy and admiration. Then, there must always be at least one gruff general who orders waiters about in a deep bass voice. There are a few more canons to be observed. The hero must not be named John or James. He must have the kind of name which annoys him through life while, fortunately, the heroine must have a simple name of biblical or historic origin. If possible, there must be an inn, for that makes a good setting, and even war figures must eat, and, besides, there must be waiters or waitresses who hear or impart state and military secrets, as it is quite customary to discuss such matters in a loud voice in restaurants and inns. There are other well-known incidents and expedients, common to all, and as old, at least, as when Virgil sang of arms and the man."

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"The individual who will knowingly violate the rights of war, or laws of trade of another nation, is well apprised that he forfeits all claim to the protection of his country, or the interference of its courts. The peace of a nation, and the interests of the fair trader, imperiously require that the smuggler, or the violator of neutrality, should be left to his fate." Johnson, J., Rose *v.* Himely, 4 Cranch 290.

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"The distinction between the purchase of vessels of war from the belligerent, in time of war, by neutrals, in a neutral port, and of merchant vessels, is founded on reason and justice. It prevents the abuse of the neutral by partiality towards either belligerent, when the vessels of the one are under pressure from the vessels of the other, and removes the temptation to collusive or even actual sales, under the cover of which they may find their way back again into the service of the enemy." Nelson, J., The Georgia, 7 Wall. 43.

**PATENTS**

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# Law Notes

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### The Kaiser in Court.

IT may not be generally known that some years ago (1856) a predecessor of the present reigning "All Highest," Frederick William IV, became a suitor in the courts of Missouri seeking to recover from the estate of a deceased postmaster a sum with which he absconded to America (*King of Prussia* v. *Kuepper's Admr.*, 22 Mo. 551). The royal plaintiff thus modestly described his status: "The plaintiff states that he is absolute monarch of the kingdom of Prussia, and as king thereof is the sole government of that country; that he is unrestrained by any constitution or law, and that his will, expressed in due form, is the only law of that country, and is the only legal power there known to exist as law." All of which is commended to the notice of those whose "consciences" revolt at the effort to prevent that type of government from gaining a world ascendancy.

### Advertising by Lawyers.

A SPEAKER at a meeting of the Peoria Bar Association said that ninety per cent of the people do not employ lawyers and do not know what their functions are. He recommended systematic advertising, saying that if people were properly informed as to the functions of lawyers they would consult them more freely and save themselves financial loss. There is no doubt that people in general are too reluctant to seek legal advice, and that their interests suffer greatly thereby. Most business men realize that the most valuable function a lawyer can render is to keep his client out of a lawsuit, and they seek professional aid promptly for that purpose. But with the great mass of the people it is otherwise. Not until trouble is imminent do they resort to a lawyer, to find that some simple act a year or two earlier would have avoided all the difficulty. If advertising will amend this situation is it worth the sacrifice of professional dignity, and is any real professional dignity thereby sacrificed? It is certainly a debatable proposition whether the prevailing view as to advertising does not rest too much on a commercial view of the profession. In every Sunday paper one may find the services at the various churches advertised, with the good music and the free pews attractively mentioned. This is justified of course on the ground that the purpose is the good to be done to the congregation and not the financial return to be obtained. But it has been urged that the same justification is available to a lawyer who for a small consultation fee may adjust a dispute or suggest a precaution which will save valuable rights or prevent an expensive lawsuit.

Of course all this contemplates advertising which shall be within the bounds of good taste, and not such a system of self laudation, "follow up" letters and the like, as was disclosed in the case of *In re Schwarz,* 161 N. Y. Supp. 1079, of which the court said: "It is impossible to reproduce in a written opinion the visual effect of the letters, circulars, folders, articles, and advertisements submitted for our inspection, and of necessity imperfectly set forth herein. They are typical of modern advertising business methods, and would be appropriate to the exploitation of patent medicines or other proprietary articles, but are utterly abhorrent to professional notions or standards. Unless the ancient and honorable profession of the law, whose practitioners are officers of the court of the highest fiduciary character, under obligations of service to the state, to the community, and to the court, is to be degraded to the rank of a quack medicine business enterprise, the advertising and business solicitation methods here under review must be emphatically and absolutely condemned."

### Amendment of Declaration in Naturalization Proceeding.

IN the complexity of European national organization as a result of the past absorption of small states and the like, it is not surprising that an occasional error should occur on the part of applicants for naturalization in the United States as to the particular sovereign to be disavowed in the preliminary declaration. There have been several decisions to the effect that an error of this kind could not be corrected by an amendment nunc pro tunc. (*In re Lewkowicz,* 169 Fed. 927; *In re Lange,* 197 Fed. 769; *In re Friedl,* 202 Fed. 202.) Those decisions proceeded on the theory that the objection was jurisdictional, and while no one of them was rendered by an appellate court they were quite generally regarded as establishing the law. But in a recent case (*In re Denny,* 240 Fed. 845) Judge Hand of the Southern District of New York takes a different view. In that case it appeared that a Russian, who had been naturalized in British South Africa, in his declaration declared his intention to abjure allegiance to the Emperor of Russia instead of to the King of England. Permitting an amendment the court said: "No one wants gratuitously to impose upon naturalization proceedings that technical spirit which easily follows a literal application of so detailed a statute, and which results in vexatious disappointment and in needless irritation to a

defenseless class of persons necessarily left to the guidance of officials, except in so far as the courts may mitigate the rigors of their interpretation. The decisions in question have, therefore, all depended upon the supposed jurisdictional nature of the requirement. . . . What part of these prescribed preliminary formalities shall be taken as jurisdictional, and what as regulative, is entirely a fluid matter, depending upon the importance ascribed to any one of them by the court. It is possible to treat literal compliance with every particular provision as an absolute condition sine qua non of any hearing, but such a meticulous temper does not suit a court. There is, indeed, no difference in the formal expression of the statute regarding any one of them which can serve as a distinction. No one, I suppose, would insist that a mistake in 'declaration of intention' as to the age, occupation, personal description, place of birth, date of arrival, name of vessel, and present place of residence in the United States would be beyond correction. No one would insist that a mistake as to similar particulars in the petition was fatal to the petition; yet there is not a particle of warrant in the statute for assuming that these particulars go less to the jurisdiction than the one in question. Obviously, unless the rule is that every statement is vital to the whole, the court must determine from their character which statements Congress intended to be crucial, and this must depend upon the substantive significance of the statement itself. The identity of the applicant certainly is in part determined by his former allegiance; but that is not conclusive, as appears from the allusion already made to the other identifying particulars. The only vitally necessary allegation in this connection is his explicit purpose to assume his new allegiance and to abjure his former sovereign, whatever he may suppose it to be. It would be an extreme of scholastic technicality to suggest that, where an applicant has twice asserted his intention to become a citizen of the United States and to renounce his fealty to the sovereign of whom he was then the subject, any doubt could be cast upon that intention because he had by mistake named the wrong sovereign. Yet just that is, as it seems to me, the necessary implication of the existing rule."

The hardship of the previous rule has been recognized by judges who felt compelled to declare it, and it is well that the matter has at least been so far set at large as to stimulate further consideration of the question.

#### Influence of the Professions.

At a recent meeting of the Chicago Bar Association, one of the speakers stirred up considerable comment by a statement that while the leadership of the bar has held its own in the last fifty years, that of the press and the pulpit has declined. The pulpit is too far outside our province to permit of its discussion. There is, however, an anecdote of a Bishop who claimed to be a greater man than a Judge because "I can say to a man 'you shall be damned' while you can but say 'you shall be hanged.'" "Yes," retorted his lordship, "but when I say to a man 'you shall be hanged' he is hanged."

The press, however, is prompt in the vindication of its own claim to leadership, pointing to its influence in political campaigns, in the flotation of the Liberty Loan and the like. If the original comparison was designed to apply to the press as a publicity agent, the rejoinder is certainly conclusive against its accuracy. But real leadership is quite another matter. There was a time when every newspaper editor had his coterie of readers to whom his words were both creed and commentary. That condition passed with the era of personal journalism. Its last vestige died with the decadence of partisan politics. No impersonal institution can long hold a place of real popular leadership. It is the personal touch, the personal enthusiasm, the capacity to excite some measure of that generous emotion called hero worship, which makes leadership. Men may enlist for a principle, but it is behind a trusted officer that they achieve the impossible. In this has always been the strength of the members of the legal profession. In the court room and on the stump they have handled affairs of acute popular interest and built up confidence and admiration among their followers. On this sure foundation of human contact rests the position of the legal profession as the real leader of American thought, and it will never be lost to any opponent who will not contend for it on the same broad platform.

#### The Elmira Jitney.

The events culminating in the recent decision in *Public Service Com.* v. *Fox,* 160 N. Y. S. 59, would afford excellent material for a novelist, were it not that all the traditions of fiction were violated by the ultimate triumph of the villain. Drawing on the public prints for some of the antecedent circumstances, it appears that in the city of Elmira there is a street railway, which may be cast for the villain's part. There is likewise in the city a factory whose employees travel to and from their work on the street cars. Enter the defendant, presumably poor but honest, and who may be imagined as engaged to a supposititious heroine. His modest patrimony consists of a team and a vehicle capable of holding 33 passengers. He engages in the business of transporting the factory employees to and from work, and visions of wedding bells and a vine-clad cottage begin to take form. Dramatic imagination may at this point supply corrupt lobbyists, secret conferences and the like to embellish the prosaic fact that a requirement of a license for "jitneys" goes into effect. Bright thought—dramatically attributed to the heroine—defendant organizes his patrons into a "mutual transportation club" whose dues are devoted to hiring him to transport them to and from their work. Virtue is triumphant and wedding bells ring out. But here enters the denouement which destroys the value of the "movie rights." The court said: "The defendant is operating a horse-drawn vehicle carrying passengers at a rate of fare of 15 cents or less through the streets of Elmira. The capacity of the vehicle is 33 passengers. Regular trips are made morning and evening. The defendant attempts to justify his operation of this vehicle by showing that his passengers are the employees, and only the employees, of a certain manufacturing plant; that these employees have formed, under legal advice, a 'mutual transportation club'; and that only the members thereof ride, each paying, when he does ride, a fare of five cents. All of which does not permit the defendant to ignore the requirement of the statute, which, for well-considered and well-understood reasons, must and should call upon this defendant to apply for and obtain from the local authorities of the city of Elmira permission thus to use its streets. Such a vehicle, while it may accommodate those who have the privilege to use it, is really, under the conditions of present-day traffic, not altogether

free from risks to those who are passengers, nor is it lacking in elements of menace to other travelers upon the highway. The local authorities are given by law the right to impose restrictions and conditions upon the use of city streets by such a vehicle, which constitutes in reality a bus line."

**Authorized Bigamy.**

IT is reported that a case has come to light in New York in which through inadvertence a decree for a limited divorce contained a provision permitting the remarriage of the plaintiff. She is accordingly in the position of having two husbands, the second taken under the express leave of the Supreme Court. The first husband has been absent and unheard of for some years, so it is probable that no complications will ensue. Common-law marriage is recognized in New York and at the expiration of the time after which the death of the first spouse is presumed from his absence the second marriage will be validated. Otherwise serious complications would be inevitable, for of course the order did not validate the second marriage. It is probable that it would not even protect against a prosecution for bigamy, since it seems that by the weight of authority a belief in the validity of a divorce is no defense in such a prosecution if the divorce was actually illegal (see *Rex* v. *Brinkley,* 10 Ann. Cas. 407 and note). While that rule is too firmly established to be dislodged except by legislative action, it seems essentially unjust. There is of course a class of acts which may properly be prohibited without regard to the intent. But since the remarriage of a divorced person is (save for sundry theological objections) an act wholly consonant with public policy, it is most irrational that an honest error of law should convert it into a felony, particularly since the error is necessarily not that of the party but of his counsel on whom he must rely.

**Suspension of Sentence.**

IN a recent issue of LAW NOTES attention was called to the decision of the federal Supreme Court denying the power of the federal courts to suspend sentence in criminal cases. A valuable side light is thrown on the policy involved in such suspensions by the action of President Wilson in granting pardons to some five thousand persons who had been released under suspension of sentence and who were liable to imprisonment under the decision declaring the suspensions to be void. The only inference to be drawn from the act of the Chief Executive is that these five thousand convicts, released without undergoing any imprisonment, had so far established themselves as law abiding members of the community that the public interest did not require the enforcement of the sentence. A procedure which has been vindicated by such results certainly deserves to be restored promptly by legislative action. This is the more imperative because the power to suspend sentence was the single instance of modern humanity which alleviated the federal criminal procedure. States have introduced juvenile courts, indeterminate and reformatory sentences, probation officers and the like, but the federal code, which should be a model of the best American thought, has resisted every progressive tendency. The stand which our government has recently taken in support of world-wide ideals of democracy has brought our domestic institutions under international scrutiny. Nations breaking from the shadow of autocratic rule will look to us as a pattern by which to rebuild their civic structure. More than ever before it behooves us to see that our criminal code is one to which we can point with pride as the fruitage of over a century of democracy.

**Speedy Justice.**

THE delay incident to criminal prosecutions in the United States is a subject which has become almost hackneyed. It has long been a subject of domestic complaint and of foreign derision. The opinion has been expressed more than once in these columns that no new statutes or rules are required to correct it, the powers of the trial judge being adequate at any time to put a stop to quibbling and unnecessary delay. This view finds considerable support in the recent prosecutions for offenses connected with the federal draft registration. Scarcely more than a month has at this writing elapsed since the day designated for registration, yet a considerable number of the offenders have been arrested, tried and convicted and are now serving their sentences. The result is peculiarly gratifying in these cases, since the prompt action of the courts and juries has undoubtedly operated to deter many from treasonable agitation. There would appear to be no reason why equal promptness should not be attained in every case.

**Reform in Civil Procedure.**

THE American Judicature Society in an announcement issued at the end of the first year of its work states that its sole purpose is that of "encouraging efficiency in the administration of justice." "We would not," say the founders, "underrate the importance of abstract justice. There will always be difference of opinion as to what is justice. But when the chance to do real justice has been foreclosed by some mere defect of machinery it is not a theory that we face but a condition the persistence of which beyond a reasonable time is a source of national weakness." The deficiencies of our systems of procedure, the delays, expense and occasional denial of justice which result from its defects have long been recognized, but in the main the matter has stopped with that recognition. Obviously there is no catholicon, no short cut to an ideal system. It is almost equally obvious that no one man or body of men knows just what is wrong or how to cure it. It is the problem of the whole bar, to be solved by its united intelligence, patiently and through much experiment. The first need is of a clearing house for ideas, and this the Judicature Society aims to supply, "inviting the co-operation of all who are interested, but offering no panacea."

**Dr. Wigmore's Suggestion.**

DR. J. H. WIGMORE has a theory of what is needed for judicial efficiency which is at least clear and direct. He advocates (*Illinois Law Review,* May, 1916) a "chief judicial superintendent," saying inter alia in support of his views: "But in our justice system, what happens? Lawyers, trial judge, jury, appellate court, attorney-general, supreme court, legislators—has any one of them the power and the duty to inquire into the botch and see that something is done to guard against repetition? No, not one of them. Each one has done his conscientious, industrious part somewhere along the line; but he had to stop when his own little part was done. Each lawyer

pleaded, each witness testified, the jury voted, the trial judge ruled, the appellate court reversed, the supreme court reversed the appellate court, and possibly, somewhile back, the legislator had passed a statute. But when, in spite of the contributions of each one, the net result of the whole case is a botch, a palpable, unmistakable, useless, wasteful botch, and you or I take it up in the printed records and see this, and everybody can see it, and everybody realizes (parturiunt montes, nascitur ridiculus mus) that the product turned out by judicial justice is what the lumberman would call 'culls,' what happens? Nothing. Who comes down from the superintendent's office and finds out what was the matter? Nobody. There is no superintendent." The idea is entitled to serious consideration if only for the eminent abilities of its advocate, and certainly all the analogies of business management support the proposition. The question arises, however, whether the proposed position is not one too exacting for any normal human being to fill. Such a superintendent without power to rectify the errors he found, without power to make new rules and to discharge incompetents, would be a mere figurehead; endowed with those powers he might easily become a Frankenstein.

#### Citizens of the World.

A CLASS of individuals who have recently been haled into court on charges of seditious conduct are prone to assert that they are "citizens of the world," apparently deeming that phrase to exonerate them from any obligation of loyalty to the country in which they live. It is of course impossible that any such citizenship should exist. "None of the opinions go so far as to say that a citizen of any country can by any act of his own divest himself of such citizenship until he becomes a citizen of another country." *Ludlam* v. *Ludlam,* 26 N. Y. 356. "The laws of the United States determine what persons shall be regarded as citizens irrespective of such persons' pleasure." *State* v. *Adams,* 45 Iowa 99. It is amusing to note that with their disclaimer of allegiance to the United States these "citizens of the world" ordinarily unite a bitter complaint of an invasion of their constitutional rights. Poetic justice is not always possible in a prosaic world, but it is regrettable that it is not possible to take these people at their word, proclaim them *caput lupinum,* and cut them off from the protection of the law which they contemn. Failing this, it remains possible only to use them as the means of a much needed object lesson in the duties which are the unescapable correlative of membership in organized society. Sincerity of a diseased and hysterical sort they may perhaps be credited with. But one is forcibly reminded of the incident of the counsel who urged before Sir Henry Hawkins that his client was suffering from a disease called kleptomania. "I know," said "hanging Harry." "It is that very disease His Majesty put me here to cure."

#### Regulation of Charity.

THE possibility that the modern tendency toward the regulation of every phase of life may go to excess was strikingly illustrated by an ordinance adopted in Los Angeles which forbade the solicitation of funds for charity except under rules to be adopted by a municipal commission. The Salvation Army, being refused a permit except on conditions with which it found itself unable to comply, appealed to the courts. In a decision setting aside the ordinance (*Ex p. Dart,* 155 Pac. 63) the court said: "Here is a great and living charity doing good to thousands of the needy and heavy-laden of Los Angeles, struck dead because it does not make over the management of its affairs to a local board of 'representative citizens' and cannot agree that it will dispense the bounty which it receives exclusively for local purposes. Charity is not only to begin at home, but to end at home saving as under 'permit' it may be suffered to go abroad. The quality of mercy (and so necessarily of charity), we are told

> —'is not strained;
> It droppeth as the gentle rain from heaven
> Upon the place beneath.'

But in Los Angeles it is to be strained and drop as from a sprinkling pot in the guiding hand of the charities commission. . . . Certain features of these ordinances at once strike the reader. Money may be freely sent abroad by any 'established church' for the uplift of the soul of the Senegambian, and this is very well; but no penny can be sent to Belgium, to Poland, to Serbia to still the wailing of the children or allay the anguish of the women except under a 'permit' from the charities commission. Nay, more, in the city of Los Angeles itself its needy childhood goes unfed and unclothed, its dependent womanhood unprotected and uncared for by organized charities except they have a 'permit.' . . . Such charitable work is not to be confounded with beggary, which imports personal gain. Most often those who devote themselves to such charities live lives of self-denial and self-abnegation for the sake of others. And the utmost limit of reasonable regulation in the matter is reached by acts protecting the public from charlatans and impostors, insuring knowledge on the part of donors of the purposes to which their contributions may be put, coupled with adequate safeguards against malversation as to the funds received. But this falls far short of the law here under review, which permits such charitable work to be carried on only by (again to quote respondent) 'trustees satisfactory to the Municipal Charities Commission.' "

#### Patriotic Lawyers.

THE Illinois State Bar Association has adopted recently the following admirable resolution:

"Resolved, by the board of governors of the Illinois State Bar Association:

"That it is contrary to the ethics of the profession for members of the bar to accept professional employment which will involve their appearance before the exemption boards now in process of formation, for the purpose of securing for individuals or classes exemption from the selective draft for services during the war."

In New York a committee of lawyers for patriotic service has been formed. The purpose of the committee is to mobilize the members of the legal profession in this city so that they may in the present emergency render such service as their professional training fits them for. The prospect is that by systematizing the work and giving it wide publicity lawyers may be enabled to render substantial assistance in a variety of ways. At present it is thought that the committee will be useful in advising persons entering the military service in connection with the making of wills, trust deeds, etc.; in taking steps to con-

serve the business of lawyers called to the front; in co-operating with governmental officials in the formation and organization of the military forces in connection with matters with which lawyers are peculiarly fitted to deal, and in providing for the relief of lawyers entering the service and their dependents.

On the other hand comment on the following press clipping may well be left to the profession which is impliedly accused of complicity in the plan therein set forth: "According to the secretary of the Cleveland socialist party, the socialist national party will place itself behind every man charged with draft opposition, seditious acts generally and all offenses growing out of the present war situation. To effect this the national executive committee of the party and lawyers retained in various anti-draft cases throughout the country, will meet in Chicago, July 6, to formulate plans for a standardized defense."

## WHAT IS NEGLIGENCE?

### *The Doctrine of Last Clear Chance.*

ONE of the most obscure phases of contributory negligence is the humanitarian doctrine, or the doctrine of last clear chance as it is frequently termed. Mr. Chief Justice Shepherd of the North Carolina court once said: "Looseness of language and dicta in judicial opinions, either silently acquiesced in or perpetuated by inadvertent repetition, often insidiously exert their influence until they result in confusing the application of the law or themselves become crystallized into a kind of authority which the courts, without reference to true principle, are constrained to follow. These observations are particularly applicable to the doctrine of contributory negligence and especially in its relation to what is generally called the rule of *Davies* v. *Mann*. All along the highway of judicial decision we find it so strewn with the wrecks of overruled cases, exploded dicta and condemned or qualified expressions that we are inclined to sympathize with the despairing remarks of Judge Thompson that 'the whole subject of contributory negligence remains in a state of great confusion and uncertainty.'" *Smith* v. *Norfolk, etc., R. Co.*, 114 N. C. 749, 19 S. E. 863, 923, 25 L. R. A. 287. This confusion and uncertainty is not, however, hopeless of explanation and elucidation. It has arisen from a loose use of terms and a failure to grasp the elements of negligence, and it is dissipated when these elements are kept in mind.

Negligence, whether on the part of the defendant or of the plaintiff, may be said to consist in action or nonaction accompanied by knowledge of the probable consequences thereof. See LAW NOTES, vol. 21, p. 45; June, 1917. This proposition embodies two obligations: (1) the use of the senses and intelligence in order to discover situations of danger; and (2) effort to avoid injury after a dangerous situation has been discovered. A confusing of these duties is what has led to the uncertainty in the decisions. The courts use the terms "negligence," "care," "fault," and the like, in order to express either or both of the obligations of (1) discovering and (2) avoiding dangers. Now, when a plaintiff comes into court complaining that an injury has been done him by the defendant, responsibility may be fixed by showing a breach of either of these obligations by either of the parties. The injury may have been occasioned (1) by the defendant's failure to look or listen, or it may have been due (2) to the plaintiff's omission to use his senses to discover the peril, or it may have been the result of an act or omission of either (3) plaintiff or (4) defendant, after having acquired knowledge of the dangerous situation. If the plaintiff shows a breach of obligation on the part of the defendant, the latter may defeat a recovery by showing a breach of the same obligation on the part of the plaintiff; but if the plaintiff establishes a breach of the duty to avoid doing him an injury after having acquired knowledge of his dangerous situation, the defendant certainly should not be permitted to escape upon proof that the plaintiff got himself into the dangerous situation through a neglect of the duty to look and listen,—that is, the duty to discover the danger as distinguished from the duty to avoid injury after having made the discovery. In other words, if the plaintiff shows that the defendant failed to look or listen, the defendant may acquit himself by proof that the plaintiff failed to look or listen; and if the plaintiff proves that the defendant knew of his danger but did nothing to avoid injuring him, then the defendant may exonerate himself by evidence that the plaintiff also knew of his danger but took no action to escape injury. But if it appears that the defendant saw the plaintiff in danger and did nothing to prevent an injury, it is no defense to show that the plaintiff would not have been in the dangerous situation if he had looked or listened.

This explanation will be found to dispel much if not all of the confused statements in the reports. For example, in discussing the doctrine of last clear chance—which is much better termed the doctrine of discovered peril—it has been said: "The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence." *Western, etc., R. Co.* v. *Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802. Here is a plain confusion of the obligations of discovering and acting. What the court meant was that the duty imposed upon all persons *to take active measures* to avoid the consequences of another's *failure to discover danger* does not arise until the *failure* of such other is existing, and is apparent, etc. It is when the driver sees on the track or road ahead a person who appears to be unconscious of the peril, and does not stop, that liability is imposed by virtue of the doctrine of discovered peril.

Take another case. A court headnote reads as follows: "The duty to observe all ordinary and reasonable care and diligence towards such person arises when his presence becomes known to the engineer, and not before. A failure in such care and diligence after that time, from which injury results, unless it could have been avoided by the use of ordinary care on the part of the person hurt or killed, will render the company liable." *Atlanta, etc., Air-Line R. Co.* v. *Gravitt*, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553. The meaning here intended to be conveyed is that the duty to *act in avoidance of an injury* arises when his presence becomes *known* to the engineer. A failure *to do so* after that time, from which injury results, unless it could have been avoided *by activity after the discovery of the peril* by the person hurt or killed,

will render the company liable. The same mixing of ideas is disclosed in a headnote which declares that "there can be no recovery for damages caused by negligence to which the person injured contributed, but when the negligent act which caused the injury is done after the negligence of the injured party is known to the other party, and the injury might have been avoided by the exercise of reasonable care on his part, there is an exception to the general rule, and the contributory negligence of the injured party will not defeat a recovery." *Keefe* v. *Chicago, etc., R. Co.,* 92 Ia. 182, 60 N. W. 503, 54 Am. St. Rep. 542.

But the most serious confusion of language is found in the cases holding that no recovery may be had merely upon proof that the defendant failed to discover the plaintiff's dangerous situation. The idea is that where both defendant and plaintiff failed to discover the danger—that is, neglected to look or listen—there can be no recovery; but the expressions in the cases are very complicated and confusing. For example, a court headnote declares that the doctrine of last clear chance "does not apply where the plaintiff has been negligent, and his negligence continues, and, concurrently with the negligence of defendant, directly contributes to produce the injury; it applies only where there is negligence of the defendant subsequent to, and not contemporaneous with, negligence by the plaintiff, so that the negligence of defendant is clearly the proximate cause of the injury, and that of plaintiff the remote cause." *Drown* v. *Northern Ohio Traction Co.,* 76 Ohio, St. 234, 81 N. E. 326, 118 Am. St. Rep. 844, 10 L. R. A. (N. S.) 421. What the court means by negligence of the defendant that occurs subsequent to the negligence of the plaintiff is a *failure to act after discovering the plaintiff's peril, the plaintiff merely having neglected the duty to discover the danger.* Again, it has been said that "plaintiff who has received an injury occasioned by the negligence of the defendant, but who could have avoided it by the exercise of ordinary care on his own part, cannot recover damages therefor, although the defendant ought to have discovered (but did not, in fact, discover) his peril in time to have prevented the accident, where the plaintiff's negligence continued up to the very moment he was hurt, and where the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort." *Dyerson* v. *Union Pac. R. Co.,* 74 Kan. 528, 11 Ann. Cas. 207, 87 Pac. 680, 7 L. R. A. (N. S.) 132.

When the courts cease to talk in terms of "negligence" and "care," referring instead to the facts of the case, an understanding of the propositions formulated is attended with little or no difficulty. Thus, we find a headnote holding in very plain language that "the doctrine of last clear chance does not operate to render a railroad company liable for collision with a team at a railroad crossing, if it was impossible for the engineer, after discovering the fact that the driver was oblivious to his peril, to stop the train before reaching the crossing." *Wilson* v. *Illinois Cent. R. Co.,* 150 Ia. 33, 129 N. W. 340, 34 L. R. A. (N. S.) 687. And so it is properly held that negligence of a railroad company in not sounding an alarm for a street crossing cannot condone the lack of ordinary care on the part of a traveler on the highway in failing to look or listen for an approaching train. *Illinois Cent. R. Co.* v. *McLeod,* 78 Miss. 334, 29 So. 76, 84 Am. St. Rep. 630, 52 L. R. A. 954.

It must be confessed that some of the expressions to be found in the opinions are baffling, even after one has become habituated to think of the term "negligence" as embodying the dual obligation of (1) discovering and (2) avoiding danger; but bearing in mind that such terms as "negligence," "fault," and "want of care," are used indiscriminately to describe sometimes one and sometimes the other of these obligations, few cases will be found to be absolutely incomprehensible. The investigator must assimilate the concept that negligence consists in "action accompanied by knowledge"—action plus knowledge—and that at times the courts are talking of the element *knowledge,* and at others of the element *action,* using the same phraseology in either case. Reading the opinions, you must discover when the courts mean one and when they mean the other; and occasionally you will be obliged actually to correct the terminology and substitute different terms; but almost always you will be able to understand what the court was trying to get at.

Berkeley Davids.

Washington, D. C.

## CONTEST BETWEEN FEDERAL DIALECTICIANS.

In Hagerla *v.* Mississippi River Power Co. (S. D. Iowa, 1912), 202 Fed. 771, 773, Smith McPherson, J., said: "That there is no other phase of American jurisprudence with so many refinements and subtleties as relate to removal proceedings, is known by all who have had to deal with them." In Price *v.* Ellis, (E. D. Ark. 1904) 129 Fed. 482, a removal case, Judge Trieber said: "The decisions of the circuit courts of the United States on this question are quite numerous, but unfortunately so conflicting that the only aid they afford is the reasoning of the different judges who decided them." As illustrating the truth of both of the foregoing statements, and as specimens of legal argumentation useful for perusal by lawyers who expect to practice in federal courts, this article presents a symposium of decisions upon one question in the law of removal of causes.

West *v.* Aurora (1868) 6 Wall. (U. S.) 139, 18 U. S. (L. ed.) 819, was an action in an Indiana court against the city of Aurora to recover the matured interest coupons of certain bonds. The defendant filed an answer under the state Code and subsequently an additional answer consisting of three paragraphs setting up new defensive matter, in each of which the defendant prayed an injunction to restrain the plaintiffs from further proceeding in any suit on the coupons or bonds, and from transferring them to any third parties, and for a decree that the bonds be delivered up to be canceled. Upon the filing of these additional paragraphs, the plaintiffs entered a discontinuance of their suit, and assuming that under the Code the new paragraphs of the answer would remain, in substance, a new suit against them for the cause and object set forth in them, filed their petition for removal of the cause to the federal circuit court. The petition was allowed by the state court, but the federal court remanded the suit as one not removable under the Judiciary Act of 1789. Affirming this order of remand the Supreme Court said: "The filing of the additional paragraphs did not make a new suit within the meaning of the Judiciary Act;" that they might have, "in some sense, the character of an original suit, but not such as could be removed from the jurisdiction of the state court. The right of removal," continued the court, "is given only to a defendant who has not submitted himself to that jurisdiction; not to an original plaintiff in a state court who, by resorting to that jurisdiction, has

become liable under the state laws to a cross action. And it is given only to a defendant who promptly avails himself of the right at the time of appearance, by declining to plead and filing his petition for removal. In the case before us, West and Torrence, citizens of Ohio, voluntarily resorted, as plaintiffs, to the state court of Indiana. They were bound to know of what rights the defendants to their suits might avail themselves under the Code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent . . . A suit removable from a state court must be a suit regularly commenced by a citizen of the state in which the suit is brought, by process served upon a defendant who is a citizen of another state, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the state court."

In Clarkson *v.* Manson (S. D. N. Y. 1880) 4 Fed. 257, the plaintiff sued in a New York court to recover the sum of $195 as balance due on a sale. The defendant filed a counterclaim for damages, claiming judgment for $750. The plaintiff filed a reply denying the allegations in the counterclaim. In due time, under the Judiciary Act of 1875, the defendant filed a petition for removal to the federal court, and filed a certified copy of the record in the federal circuit court. The jurisdictional amount for removal was then $500, as under the Judiciary Act of 1789. In the federal court the plaintiff filed a motion to remand to the state court. The defendant contended that the matter in dispute, on the issue raised by the counterclaim and reply thereto, exceeded $500, therefore presenting a removable case. Sustaining this contention and denying the motion to remand, Judge Blatchford referred to the provisions of the New York Code as to counterclaims, pursuant to which he said, "a counterclaim is held to be an affirmation of a cause of action against the plaintiff, in the nature of a cross-action, and upon which the defendant may have an affirmative judgment against the plaintiff"—in this case possibly for the entire $750 in addition to the dismissal of the plaintiff's complaint and the defeat of the plaintiff's claim. He pointed out that "the statutes of New York now use the word 'action' and discard all other terms," and that the proceeding by the defendant against the plaintiff was a civil action. He held that the whole suit was removed, including all the issues. As to the case of West *v.* Aurora, above quoted, he declared merely that it "is not in point," and that "the facts there were not at all like the facts in this case, and it arose under a different statute."

In Carson, etc., Lumber Co. *v.* Holtzclaw (E. D. Mo. 1889) 39 Fed. 578, a case of removal by a plaintiff on the ground of prejudice or local influence, the suit as brought involving less than the jurisdictional amount for removal, but the defendant having claimed judgment for a sufficient amount in a counterclaim, Thayer, J., denying a motion to remand, adopted the view of Judge Blatchford in Clarkson *v.* Manson above quoted, that the counterclaim created "a controversy in which the original plaintiff occupies the attitude of a defendant."

"The right to plead matters by way of counterclaim," he continued, "has been so much enlarged by the Code of Procedure now in force in many states that it will often happen, as in this case, that a nonresident plaintiff, forced to sue in a state court for a small amount that is perhaps undisputed, will find himself confronted by a large demand in the shape of a counterclaim that he would have been entitled to remove to the federal court had the plaintiff in the counterclaim been the first to sue."

In La Montagne *v.* T. W. Harvey Lumber Co. (E. D. Wis. 1891) 44 Fed. 645, the plaintiff brought suit claiming less than the jurisdictional amount for removal, and the plaintiff filed a counterclaim for more than the jurisdictional amount and simultaneously filed a petition for removal. The federal court remanded the case solely for the reason that the amount of a counterclaim cannot be deemed part of the matter in dispute for the purpose of removal. But the court overruled the contention that with respect to the counterclaim the defendant stood in the light of a plaintiff and therefore could not remove the cause.

"There is but one suit," said Judge Jenkins, "however numerous the causes of action involved, and although some one or more of them exist in favor of the defendant. In that suit the party by whom it was instituted is the plaintiff, and so remains, whatever rights he is permitted to assert against the plaintiff. It is to this party, known to the record as the defendant, being a nonresident, that the law grants the right of removal. It is not given to the original plaintiff under any circumstances." On this point the judge conceived that Carson, etc., Lumber Co. *v.* Holtzclaw, above cited was "in direct antagonism to West *v.* Aurora" first above quoted. "There is no substantial difference," said he, "between the statute there considered [in West *v.* Aurora] and that now existing as to the party having the right of removal."

In Walcott *v.* Watson (Nev. 1891) 46 Fed. 529, the plaintiff sued in a Nevada court, the amount demanded by him not appearing in the report of the case. The defendant by way of cross-complaint and as a counterclaim demanded damages in the sum of $40,000. Judge Hawley held that the plaintiff thereby became a defendant and entitled as such to remove the case for prejudice or local influence.

"When the defendant filed his answer it presented a new and independent issue, and was not wholly in the nature of a defensive plea, as in West *v.* City of Aurora [above quoted]. Morever the facts in the case were dissimilar from the facts in this case, and the statute of this state, in relation to counterclaims is, in some respects, essentially different from the provisions of the Code of Indiana upon which the decision was based."

In Waco Hardware Co. *v.* Michigan Stove Co. (C. C. A. 5th Cir. 1899) 91 Fed. 289, 63 U. S. App. 396, 33 C. C. A. 511, a suit was brought in a Texas court by the stove company against the hardware company. The latter answered, setting up a demand in reconvention, and the plaintiff removed the suit to the federal court. Holding that a motion to remand was erroneously denied, Boardman, J., speaking for the Circuit Court of Appeals, said:

"Notwithstanding the Act of 1887-1888, in its terse language, clearly restricts the right to remove to 'the defendant or defendants' the counsel for defendant in error, relying solely upon such implications of law as he reads, in a persuasive way, between the lines of the Act, urges the court to read the words 'the defendant or defendants' out of the lines of the reactionary act, and extend to and give to his client, the plaintiff in the state court, a right which the law clearly intends to give only to 'the defendants' therein. Such a view or contention of counsel is not supported, directly or by analogy, by the authorities." And it was deemed that the decision in West *v.* Aurora, above quoted, settled the question adversely to the plaintiff's contention.

In McKown *v.* Kansas, etc., Coal Co. (W. D. Ark. 1901) 105 Fed. 657, the plaintiff having sued in the Arkansas court for an amount less than the jurisdictional amount for removal, the defendant filed a counterclaim of $10,000 and removed the case. A motion to remand was granted. Rogers, J., after referring to each of the cases above cited came to the conclusion:

"That in a case like the one at bar the defendant in the action as originally brought, or the titular defendant, only, can remove the case," and that whether that proposition be correct or not the question was so doubtful that the cause should be remanded. "In states where the defendant, if he has a counterclaim, is compelled under the state code, to plead the same, a contrary rule," said the court, "may be essential to the ends of justice; but in this state a defendant is not compelled to plead his counterclaim. He may or may not do so, at his election."

In Price *v.* Ellis (E. D. Ark. 1904) 129 Fed. 482, where the plaintiff sued in an Arkansas court to recover a sum less than the jurisdictional amount for removal, the defendant filed a counterclaim for a greater amount, and it was held that the plaintiff thereby became entitled to remove the cause. Judge Trieber said the question had not been authoritatively settled by the decision of any court whose judgment was conclusive on him. As to the ruling by the Supreme Court in Aurora *v.* West, above quoted in this article, he said:

"As that case construed an act of Congress different from those now in force, it has no application to causes arising under the present acts."

Judge Trieber distinguished McKown *v.* Kansas, etc., Coal Co., last above quoted, on the ground that the removal was there sought by the original defendant. "That the defendant who files a counterclaim becomes, as to the counterclaim, a plaintiff, under the statute of Arkansas, and the original plaintiff becomes the defendant, has been fully determined by the court of last resort of that state in Heer Dry Goods Co. *v.* Shaffer, 51 Ark. 368, 11 S. W. 517." The judge then cited as applicable by analogy to the case in judgment, Lovell *v.* Cragin, 140 U. S. 130, 10 S. Ct. 1024, 34 U. S. (L. ed.) 372, and Block *v.* Darling, 140 U. S. 234, 11 S. Ct., 832, 35 U. S. (L. ed.) 476, in both of which cases the Supreme Court held that the amount claimed by a defendant in his cross-bill or counterclaim could be considered in determining whether the amount of $5000 then required for jurisdiction by appeal or error was involved. Warming up to the argument, Judge Trieber continued:

"While, under the laws of this state, a defendant is not compelled to set up his counterclaim in that action, but may maintain a separate suit thereon, he has the right to do so, and, as determined by the highest court of the state, it thereupon becomes 'in every respect a cross-action, with the parties reversed.' There is no reason why a nonresident thus involuntarily made a party defendant in an action in which judgment for more than $2,000, exclusive of interest and costs, is demanded and can be rendered against him should be deprived of his right to remove the cause to a national tribunal, if he so elects. It is true, he selected the state court as the forum in which to litigate his cause of action when he instituted the suit originally, but, as his claim for which he instituted that suit did not exceed in value the sum of $2,000, exclusive of interest and costs, he had no choice in the selection of the forum, for that was the only court which had jurisdiction of the subject-matter. It was the filing of the counterclaim alone which gave him the right of election, and, if he avails himself of this privilege within the time prescribed by the statute, 'at or before the time he is required by the laws of the state or the rules of the court to answer or plead,' which can only be done after the filing of the counterclaim, and which must be done 'on or before the calling of the cause for trial' (section 5736, Sandell's & H. Digest of Statutes of Arkansas), I can conceive of no substantial reason why he should not be entitled to remove the same."

The judge then quoted from the well known case of Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 U. S. (L. ed.) 673, in which it was held that a nonremovable case may become removable by subsequent developments in the case, and continued as follows:

"This excerpt applies with great force to the facts in this case. See also Jones *v.* Mosher, 107 Fed. 651, 46 C. C. A. 471. Had the defendants instituted an original action against the plaintiffs on their counterclaim, the cause would clearly have been removable, and it was the filing of the counterclaim, although a suit was then pending between the parties, which brought the cause within the terms of the statutes regulating removals of causes from the state to the national courts. The petition for removal in this case was filed by the plaintiffs, who became defendants in the cross-action, and were nonresidents of this state, as soon as the facts necessary to confer jurisdiction on this court were made a part of the record, and within the time they were required by the laws of this state to file a reply, and this was the first opportunity they had to elect one of the two forums in which to try their case. Before that time no right of election existed, and, of course, they could exercise none."

At this place the writer of this article would suggest in reply to the last part of the foregoing argument, that there is no reason to suppose the Supreme Court, when it decided Aurora *v.* West, would have denied that a case nonremovable under the Judiciary Act of 1789 could have become removable; it simply held that the case had not become removable *by the original plaintiff*.

In Indian Mountain Jellico Coal Co. *v.* Asheville Ice, etc., Co., (W. D. N. Car. 1905) 135 Fed. 837, the plaintiff sued in the North Carolina Court for an amount less than that required for federal jurisdiction, and the defendant filed a counterclaim demanding a sum exceeding said jurisdictional amount. Judge Pritchard, remanding the case, quoted from decisions of the North Carolina Supreme Court, and said:

"In view of these authorities, it is manifest that where a defendant sets up a counterclaim which grows out of the transaction on which plaintiff brings his action, and the same is properly pleaded, it is in the nature of a cross-action, and does not change the status of the parties, and there can be no process of reasoning by which it can be made to appear that under such circumstances the plaintiff becomes a defendant in the sense contemplated by the removal act. . . . The [removal] act is plain and explicit, and contains no exceptions. Everything relating to the question of removal by nonresident defendants was before Congress at the time of the enactment of the section under which this case was removed. It was within its power to have provided that in cases like the one under consideration the plaintiff should be treated as a defendant, for the purpose of removal; and the fact that no provision was made clearly indicates that it was its intention to restrict removals from the state to the federal courts to cases where defendants are nonresidents at the time of the commencement of the action, and the jurisdictional amount is involved." The judge then quoted at length from West *v.* Aurora as set forth near the beginning of this article.

In Illinois Cent. R. Co. *v.* Waller (N. D. Ky.) 164 Fed. 358, the railroad company brought an action in the Kentucky court to recover $66. The defendants filed an answer pleading a counterclaim for $3000 damages for breach of contract. The company then removed the case. But Judge Evans sustained a motion to remand and his argument in support of that ruling is a masterpiece of legal reasoning. After citing all of the conflicting cases above referred to in this article, he said: "Whether the actual plaintiff in the suit can be transmitted into a defendant, within the meaning of the statute, by the filing of an answer and counterclaim under the Kentucky Code of Practice is the question upon which the decision of this motion to remand must turn."

"Amidst the conflicting views of the courts," he continued, "the right of a plaintiff to remove such cases has always been upheld, where upheld at all, upon the ground that by pleading a counterclaim the actual defendant thereby as to such claim potentially converted the actual plaintiff into a defendant. In a certain sense this may be correct, but whether Congress, in the language employed in its legislation on the subject, so intended, may admit of grave doubt. That language is explicit, and is that the case may be removed 'by the defendant or defendants therein, being nonresidents,' where, as here, the ground therefor is diversity of citizenship. Whether that language should embrace a case like this must depend upon whether the Congress of 1887 so intended. In an effort to ascertain whether that Congress did so intend, it may be helpful to recall certain opinions of the Supreme Court in somewhat analogous cases."

He then quoted from the opinion in Platt *v.* Union Pac. R. Co., 99 U. S. 63, 25 U. S. (L. ed.) 424, wherein it was said that "there is always a tendency to construe statutes in the light in which they appear when the construction is given," and from

the opinion in United States *v.* Union Pac. R. Co., 91 U. S. 81, 23 U. S. (L. ed.) 224, wherein the court said: "Congress acted with reference to state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events"—on which point he might also have cited the article *Statutes and Statutory Construction,* Federal Statutes Annotated (1st Ed.) vol. 1, p. xxiv, now in Fed. Stat. Ann. (2d ed.) vol. 1, p. 25, § 16, referring to many other cases. Judge Evans then said:

"Indeed, the general proposition is well established, that, in order to ascertain the intent of Congress, it is entirely admissible to look at the conditions surrounding the subject-matter of any legislation at the time of its enactment. Fifty years ago most of the states then in the Union had adopted Codes of Practice which more or less radically changed the common-law forms and modes of procedure. Other states as they were admitted doubtless did the same thing. Probably, and we think certainly, all of these Codes authorized a defendant in an action to seek counter relief against the plaintiff in the latter's own suit, instead of having to resort to an independent proceeding. None of the older Codes, so far as we can ascertain, in terms authorized the courts to construe the word 'plaintiff' as meaning 'defendant' when counter relief was sought by the actual defendant by his answer in the case. This was a much more modern invention. We are not advised that any of the Codes had such a provision previous to 1867, when the Supreme Court decided the case presently to be mentioned, nor are we advised that such a provision became general before the passage of the Judiciary Act of 1887, if, indeed, it has ever become so. We strongly incline to think, however, the case may now be, that such a provision was a rare exception and not the rule in 1887."

He then quoted the provision in the Kentucky Code of Civil Practice providing that "the word 'plaintiff' embraces a defendant who demands a set-off or counterclaim; the word 'defendant' embraces a plaintiff against whom such demand is made," and said:

"This was the earliest appearance of that provision, or anything like it, in a Kentucky Code, and the plaintiff here now mainly relies upon this special clause in that Code as bringing this case within the general language of the Judiciary Act of 1887. But did Congress contemplate or intend that the language it used should be construed according to its natural import, or did Congress intend that its meaning might be altered or affected by the legislation of other jurisdictions enacted without congressional consent? It seems to the court to be entirely clear that the language used by Congress must be construed according to its natural import. The natural import of the words 'defendant or defendants' includes those persons only who, upon the record, are actually and not merely constructively such, as distinguished from the actors or plaintiffs therein, and the court is of opinion that Congress did not authorize the courts to change that import from time to time in order to meet the fluctuations of state rules for the construction and definition of words used in their respective Codes of Practice. We think this proposition is incontrovertible and of itself decisive of the case. The legislation of Congress was fixed when enacted, and could not be changed, directly or indirectly, by any power except its own. But there are other propositions equally cogent. So far as the cases we have cited give any indication, the other states in which they arose had Code provisions analogous to those of Kentucky in the Code it enacted before 1877, and we must assume that Congress was perfectly aware of the almost, if not quite, universal rule of the states to permit an actual defendant, when sued, not only to plead to the merits of the plaintiff's claim, but also to set up counter demands in his own favor. But, though Congress well knew of these laws of the states, it has never in any removal act in terms extended the rights of removal to a plaintiff in whose suit a defendant interposed an answer setting up a counter demand for any sort of positive relief in his own favor against the actual and original plaintiff. The failure of Congress to change the language of the earlier removal act in this respect is all the more significant when we consider the opinion of the Supreme Court delivered in 1867 in the case of West *v.* City of Aurora, 6 Wall. 139, 18 L. ed. 819. . . . Congress, with that opinion before it which explicitly denied to the plaintiff the right to remove such a case, and which put a definitive limitation upon the word 'defendant' as used in section 12 of the original judiciary act, deliberately declined to change or broaden the language so construed. By using substantially the same language as that which had thus been interpreted, Congress, in the act of 1887 and amendments thereto, emphasized the legislative intent that a plaintiff in a suit should not, by construction, be regarded as a defendant when, in a suit of his own filed in a state court, his opponent under the state practice turned upon him with a prayer for independent and affirmative relief in plaintiff's suit, instead of a separate action. Nor can we doubt that the Supreme Court, in West *v.* City of Aurora, meant to lay down the general proposition that the word 'defendant,' used in the judiciary act, did not include, and was not meant by Congress to include, any person except actual and technical defendants, who are such on the record, as distinguished from the actor or plaintiff therein. Unless we disregard these indicia of legislative intent, we cannot conclude that the act of 1887, in the use of the words 'defendant or defendants,' should have a different meaning from that of the act of 1789 in respect to the character of the party to whom the right of removal is given. The essential proposition, established by the Supreme Court and acquiesced in by Congress, is that when a plaintiff sues in a state court he cannot, upon the mere ground of diverse citizenship, remove his suit to the federal court when the defendant thus sued by him avails himself of the right to seek in that suit a claim to counter relief of an independent and affirmative character. Full effect should be given to the natural meaning of words used in a legislative enactment, unless there are indisputable grounds for the conclusion that the legislative body did not so intend in the particular instance. Here the use of substantially the same word as that previously interpreted by the Supreme Court unmistakably manifests the congressional intent. The general proposition is well established that, where words in a statute have acquired through judicial interpretation a well-understood meaning, it is assumed that that meaning was intended in subsequent statutes on the same subject." To the latter point see also a multitute of cases cited in the article *Statutes and Statutory Construction,* Federal Statutes Annotated (1st ed.) vol. 1, p. lxx; second edition, vol. 1, p. 114, § 89.

In Hagerla *v.* Mississippi River Power Co. (S. D. Iowa 1912) 202 Fed. 771, a condemnation proceeding instituted by the Power Company, Hagerla, a landowner, filed a cross-petition for affirmative relieve claiming $20,000 damages and praying for an injunction. It was held that he thereby made himself a complainant in a bill in equity, and that the Power Company had a right of removal as a defendant. West *v.* Aurora, cited at the beginning of this article, was distinguished by the circumstance that the plaintiffs in that case dismissed their original pleading and "then nothing was left for decision other than the defensive plea."

In Clover Mach. Works *v.* Cooke Coal Co. (E. D. Ky. 1915) 222 Fed. 531, an action in the Kentucky court on promissory notes for $500 each, the defendant filed a counterclaim and answer demanding $6000 damages, whereupon the plaintiff removed the suit. Judge Cochran referred seriatim to the provisions in Judicial Code, sec. 28, and then said:

"In no contingency whatever is the right to remove conferred on a plaintiff. This would seem to settle the question in hand. The removing party here is the plaintiff in the suit, and not the defendant. It is true that the works is in a defensive position as to the counterclaim; but it is still the plaintiff therein, and the coal company is the defendant. Because of the counterclaim there are not two suits. There is still but one suit. And it is the defendant in that one suit who is a nonresident of the state who has the right of removal. The works is a nonresident of the state, but it is not the defendant in the suit. It is the plaintiff. The coal company is the defendant. The existence of the counterclaim does not change the relation of the parties to the suit. . . . The question seems to me to be foreclosed by the decision of the Supreme Court in the case of West *v.* Aurora, 6 Wall. 139, 18 L. ed. 819. It is true that that case arose under the Judiciary Act of 1789. But under that act, as under this, the right of removal

was confined to the defendant. And, if no removal could have been had under that act by a plaintiff in such a case as we have here, a fortiori it cannot be had under the Judicial Code. That Code continues substantially the provisions of the act of 1887-88. That was an amendment of the act of 1875. By that act the right of removal was given to the plaintiff, as well as defendant. By the amendment the right of removal by plaintiff was taken away, and it was limited to the defendant. In no contingency was it recognized that the plaintiff should have the right to remove, except in a suit between citizens of same state claiming under grants of different states. The object and purpose of the amendment was to cut down federal jurisdiction. And much has been made of this circumstance in construing the amendment." Singularly, the case of Illinois Cent. R. Co. *v.* Waller, 164 Fed. 358, in the Kentucky district, above quoted in this article, was not cited.

Have not some of the courts in the opinions above quoted given undue weight to the provisions in the state statutes respecting the attitude of a party filing a counterclaim? In Mason City, etc., R. Co. *v.* Boynton (1907) 204 U. S. 570, 27 S. Ct. 321, 51 U. S. (L. ed.) 629, it was held that a landowner in condemnation proceedings in Iowa was the defendant for the purpose of removal although the Iowa statute declared that "the landowner shall be plaintiff and the corporation defendant." Mr. Justice Holmes said: "This court must construe the act of Congress regarding removal. And it is obvious that the word 'defendant' as there used is directed toward more important matters than the burden of proof or the right to open and close. *It is quite conceivable that a state enactment might reverse the names which, for the purposes of removal, this court might think the proper ones to be applied.*"

In conclusion, the writer ventures to predict that when the Supreme Court shall be called upon to decide the question above discussed by the judges of the lower federal courts it will regard the ruling in West *v.* Aurora as conclusive in all cases whatever where a plaintiff seeks to remove a suit as the defendant to a counterclaim or cross-bill.

CHARLES C. MOORE.

## WAR AND THE DISCHARGE OF CONTRACTS.

THE law of contract will—as one of the minor results of the war—become greatly developed through decisions on the effect of the war on the contractual relationships of parties to a contract. A great number of the reported cases nowadays deal with matters of temporary importance only. Thus we find case after case determined on the construction of emergency statutes. These decisions may be of importance at the present time, but they will never furnish much additional material to the judge-made law of contract. Their effect is transitory. Not only will these statutes cease to have any operation after the lapse of a few months of peace, but even in wartime their existence on the statute book is essentially precarious, for statute follows statute with considerable rapidity, and what is now the emergency statute law of to-day may be entirely altered by some amending act in the course of a month or two.

But the war decisions are by no means all of this type. There are cases being decided at this present time that will probably be quoted years hence as authorities which have developed the law. This is particularly the case as regards the law of contract. The effect of the war on contracts is a highly important matter at the present day. The effect of the war *qua* war is, however, one thing. The effect of the war on contracts, in the sense of developing a general principle of law, resulting, no doubt, from the present abnormal circumstances, but nevertheless illustrating or developing a standing permanent principle of law, is quite another matter. It is to this latter type of case that we propose to address our attention. We propose to call the reader's attention to some of the very recent cases resulting from the war, but nevertheless developing a permanent principle of law. We propose to deal with such of these cases as treat of the effect of impossibility of performance on the rights of parties to contracts. Such cases are both of temporary and of permanent importance.

It is, of course, within common experience that the performance of contracts is being frequently interfered with in one way or another. The chief source—and, indeed, an increasingly frequent source—of interference is by Government departments and similar authorities under statutory powers. This interference may have any one of three results on a subsisting contract. It may disturb the parties in their dealings while leaving a contract on foot and their legal rights unaffected. Secondly, it may put an abrupt end to the contract. Thirdly, it may suspend the performance of the contract. With the first of these results we need not deal. Contractual relationships remain intact. Only a practical inconvenience is caused. It is to the second and third we propose that we shall call the reader's attention. We must review as briefly as possible the former authorities on this matter —the effect of unforeseen circumstances rendering performance impossible.

The root principle would appear to be this—that every contract must be performed. If a contract cannot be performed for some unforeseen reason, then the contract fails and the parties are discharged. Observe the inconsistency between these two statements. Yet these two statements seem fully justified by the authorities. They must be harmonized, and to bridge that difficulty the courts have from time to time had recourse to divers doctrines. In support of the first principle—the root principle as we have called it—we may refer the reader to the well-known statement that a man must either perform his contract or pay damages for not performing it. "There seems to be no doubt," said Lord Blackburn in Taylor *v.* Caldwell (1863, 3 B. & S. 826, at p. 833), "that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible."

That a contract should be held to be discharged because one party, as subsequent events prove, has made a bad bargain, could, of course, never be sustained as a proposition of law based on logic or convenience. But again and again the courts have held a contract to be at an end when circumstances have subvened before the performance which render performance impossible. Logically, therefore, it would seem that the true position is this: If a man undertakes to perform a contract in clear, unconditional terms, he in effect undertakes to perform it, come what may. His contract is, indeed, to do or to procure the doing of the thing in question, and to pay damages if the thing for some foreseen or unforeseen circumstance is not done as agreed. That seems to be the true explanation. It is qualified only by this, that the thing to be done must be lawful. If a man purports to contract to do an unlawful act there is no contract. If the act would be lawful when the contract is made and becomes unlawful before performance, we have a refinement with which we need not deal.

The old case of Paradine *v.* Jane (1647, Aleyn, 26), and, indeed, all the covenant cases for repairing houses where lessees have been held bound to rebuild after fire, may be cited as

illustrating the general principle that mere burdensomeness is not a ground for relieving a man from his contract. In Paradine *v.* Jane a lessee was sued for rent. He had been put out of possession by rebels, who kept him out so that he could not take the fruits of the demise or enjoy the property. Yet he was held bound to pay rent. It is obvious that a covenant to pay could be in fact discharged notwithstanding that the covenantor was out of possession.

The courts have always been ready to find some ground on which to qualify the application of the general root principle that a man must perform his contract or pay damages where unforeseen circumstances render performance impossible. There seem to be two main grounds for escaping the consequences of the root principle. It may, however, be doubted whether logically there is not, indeed, one ground only. However, in the present state of the development of the law of contract it is better to recognize the two grounds for exception. The first is that there is some tacit condition for the continuance of circumstances rendering performance possible. The second is that the whole contract falls to the ground and is gone, in so far as any future performance is concerned.

The case of Taylor *v.* Caldwell (sup.) is an instance of the application of and an authority for the proposition that where the court finds that there is some implied or tacit conditions that some state of circumstances rendering performance possible should continue to exist, then, if for some unforeseen reason that state of circumstances ceases to exist, the parties are absolved from the contract. Thus in Appleby *v.* Myers (16 L. T. Rep. 669; L. Rep. 2 C. P. 651) the plaintiffs contracted to erect certain machinery in the defendant's buildings and to keep the machinery in repair for two years. When some of the work had been done the premises were destroyed by fire, so that the plaintiffs were not able to perform their contract. It was held that both parties were excused from any further performance of the contract. Again, in Baily *v.* De Crespigny (19 L. T. Rep. 681; L. Rep. 4 Q. B. 180) a man covenanted not to build on certain land, and bound himself and his assigns (with notice) accordingly. The land was taken by a railway company under statutory powers and they built on the land, but the court held that the covenantor was discharged from his contract. Again, in Robinson *v.* Davison (L. Rep. 6 Ex. 1) a lady was engaged to perform on the piano at a concert to be given by the plaintiff. Unfortunately when the day arrived she was ill and unable to perform, and this fact was held to discharge the contract on the ground that her ability to perform was a tacit condition.

These contracts for personal service illustrate the general principle, although no doubt they are *a fortiori* cases. "It must be conceded," said Chief Baron Pollock in Hall *v.* Wright (E. B. & E. 746, at p. 793), "that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them. So a contract by an author to write a book, or by a painter to paint a picture within a reasonable time, would, in my judgment, be deemed subject to the condition that, if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death." It is only a step further than this clear-cut principle which would reach this proposition, that every contract entered into between reasonable men contemplates the continuance of a state of circumstances in which performance is still possible; and if performance subsequently becomes impossible through no fault of the parties, then the circumstances have ceased to exist, and it is by the contract that the contract becomes discharged. We would repeat our warning that so far the courts have not quite countenanced this view, preferring rather to put it on failure of the contract altogether. Apparently the ground for shrinking from this step—a logical step, it seems to us—is that it would be too risky to embark on constructing hypothetical terms to a contract. There are indications of this in the two cases of Blakeley *v.* Muller & Co. and Hobson *v.* Pattenden & Co. (88 L. T. Rep. 90; (1903) 2 K. B. 760n.), which were heard together on appeal. Those cases concerned the hiring of seats for King Edward's coronation procession on a certain day. The procession did not take place, and the court held that the contracts were discharged, but not void *ab initio*, and that the loss must remain where it was at the time of abandonment. The court would not find a term that was not expressed as to how the parties were to stand if the procession did not take place. The matter was dealt with as if a pair of scissors had cut the whole thing in two and left the parties to their respective ends.

The judgments in the recent case of R. A. Tamplin Steamship Company Limited *v.* Anglo-Mexican Petroleum Products Company Limited (115 L. T. Rep. 315; (1916) 2 A. C. 397) and in the even more recent case of Metropolitan Water Board *v.* Dick, Kerr & Co. (142 L. T. Jour. 385; (1917) W. N. 98) go to show that the theory respectfully put forward above will in due course be recognized as the true ground for holding contracts discharged by reason of subsequent impossibility of performance. These judgments certainly seem to imply that a tacit condition that there shall be a continuance of the possibility of performance is the real ground for holding a contract discharged when performance has become impossible through unforeseen circumstances. The first of these two recent cases is a House of Lords case. A tank steamer was chartered for sixty months at a fixed sum per month. On the outbreak of the war the ship was requisitioned by the Admiralty, and certain alterations were made in her for her new purpose. There were then nearly three years of the charter term to run. The owners claimed the charter-party had been determined by the requisition. The charterers were prepared to continue to pay the agreed freight, and they contended that the charter party was still subsisting. The House of Lords took the latter view.

Lord Haldane, who, with Lord Atkinson, dissented, expressed the view that the contract was gone as the use of the ship and the fulfilment of the purposes of the charter had been swept away by a *vis major* for a period to which no limit could be assigned. It would seem to be, at any rate, partly upon the authority of this view that the second of these two recent cases was decided. In this second case (Metropolitan Water Board *v.* Dick, Kerr & Co.) the defendants had agreed to construct a large reservoir for a certain sum within six years, and under the contract all tools, etc., brought by them on to the works were for the time being to be the property of the plaintiffs. When the work had been started and tools, etc., to a considerable value had been brought on to the works, the Minister of Munitions, acting under statutory powers, ordered the defendants to cease and to hold their plant and labor at the disposal of the Minister. The tools, plants, etc., or a considerable part of them, were removed by the direction of the Minister and sold to munition factory owners. The men were nearly all taken away from the works. The plaintiffs claimed that in these circumstances the contract was only suspended. Under the contract

the engineer had power to allow an extension of time for completing the contract because of any difficulties or impediments. The court held, however, that it was discharged, on the ground that there was more than a temporary prohibition—the continuance of a state of war being too uncertain to be regarded as temporary.—*Law Times.*

## Cases of Interest

Liability of Hospital Maintaining Elevator Operated by Automatic Push Button.—The degree of care which the owner of an automatic push button elevator must employ in its maintenance receives the attention of the Louisiana Supreme Court in Ross *v.* Sisters of Charity of Incarnate Word, 75 So. 425. Its conclusions are as follows: The owner of a passenger elevator operated in a business building for carrying passengers may not be a carrier of passengers in the sense that he is bound to serve the public; yet his duty is to protect the passengers, and he is bound to do all that human care, vigilance, and foresight can reasonably suggest under the circumstances, and, in view of the mode of conveyance adopted, to guard against injuries and accidents resulting therefrom, and a failure in this respect will constitute negligence rendering him liable. But failure to employ an operator for a single automatic push button elevator in a hospital or asylum is not actionable by any passenger, except a child of such tender years who cannot know and appreciate the risk; and a person of mature years, using such elevator under those circumstances, would have to establish other facts to recover damages for injuries sustained by him in such an elevator.

"Confidence Game" as Including Promise of Woman to Marry with No Intention of Fulfilling, but to Get Promisee's Property.—The case of People *v.* Miller, (Ill.) 116 N. E. 131, holds that a woman who procures money from a man on a promise to marry him, with no intention at the time of the promise to carry it out, is guilty of violating the confidence game statute. Duncan, J., for the court says: "The evidence in the record clearly proves that Lodavine [a woman] entered into the marriage contract with Foulkes without any intention of keeping that promise, but did it for the unlawful purpose of gaining his confidence, so that she might obtain from him his money and property, as contended by the state. Her unlawful conduct was clearly a confidence game within the meaning of the statute, and she was proven guilty, beyond all reasonable doubt, of obtaining by means and by use of the confidence game the money and property of Foulkes, as charged in the indictment. . . . The contention cannot be maintained that Lodavine was merely guilty of the breach of a marriage contract. Her breach of that contract was a mere incident of her false and fraudulent scheme to obtain from Foulkes his money. She entered into the contract, and made her declarations of love and affection and repeated vows that she would keep her promise, for the unlawful purpose of obtaining his confidence and his money, and for that purpose only. The transaction was clearly a 'swindling operation,' in which she took advantage of the confidence reposed in her by Foulkes—a confidence which she had obtained by deceit and false promises as aforesaid. The case comes clearly within the confidence game statute."

Application of Statute Prohibiting Corporation from Purchasing Land for Agricultural Purposes.—A Mississippi statute passed in 1912 prohibiting corporations from acquiring title in fee or for a term of years, to, or owning lands for agricultural purposes, was held in Southern Realty Co. *v.* Tchula Co-operative Stores, (Miss.) 75 So. 121, to have no application to a corporation created in 1888 with power to have, hold, acquire and enjoy real and personal property in fee simple or otherwise as it might deem proper. The court said: "The grant by the state to appellee of power to acquire and enjoy real estate, without limit as to value and quantity, is a contract within the meaning of section 16 of our state constitution, and article 1, § 10, of the Constitution of the United States, and cannot now be withdrawn, no right so to do having been reserved when the grant was made. Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. ed. 629. 'The state must observe good faith as well as individuals, and she can no more withdraw what she has granted than can an individual, unless she has reserved the power to do so.' Payne *v.* Baldwin, 3 Smedes & M. 661. But it is said that this rule has no application here, for the reason that the state, under its police power, and 'for the purpose of preventing the monopolization of agricultural land,' can withdraw from corporations power heretofore granted them of acquiring such land, although the right so to do was not reserved when their charters were granted. Conceding, for the sake of the argument, that the state has the power to prevent appellee from monopolizing agricultural land, it is not necessary, in order to accomplish such a purpose, to withdraw from it all power to acquire any such land. We are of the opinion, therefore, that chapter 162, Laws 1912, has no effect on appellee's charter."

State Workmen's Liability Act as Applicable to Stevedore Unloading Vessel of Nonresident Corporation Plying Between Different States.—A decision which Mr. Justice Pitney in a dissenting opinion said was one of "momentous consequences" was handed down by the United States Supreme Court in the case of Southern Pac. R. Co. *v.* Jensen, 37 Supreme Court Reporter 524. The facts were briefly as follows: A stevedore while unloading a vessel at the port of New York owned by the Southern Pacific Company, a corporation of Kentucky, and plying between Texas and New York, was killed. His relatives presented a claim under the New York Workmen's Compensation Act and received an award. The award was approved by the state courts of New York, but their judgment of approval was reversed by the Supreme Court of the United States on the ground that the state compensation act could not apply as the case was governed by admiralty law. Strong dissenting opinions were written by Justices Holmes and Pitney, concurred in by Justices Brandeis and Clarke. The reasoning of the opinion of the majority, which was by Mr. Justice McReynolds, ran along lines as follows: "The work of a stevedore, in which the deceased was engaging, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. . . . If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. . . . The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid. Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the federal district court, 'saving to suitors in all cases the right

of a common-law remedy where the common law is competent to give it.' The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

RIGHT OF SUBJECT OF GERMANY TO SUE IN STATE COURT.—Vice Chancellor Lane of the Court of Chancery of New Jersey in Possett *v.* D'Espard, 100 Atl. 893, refused to stay a suit brought by a subject of Germany, resident in the United States, and a German corporation for the preservation of the rights of the complainants as stockholders in a New Jersey corporation. The subject had taken out his first papers. In part the Vice Chancellor said: "The bill is for the preservation of the rights of the complainants as stockholders in a New Jersey corporation and also in the interest of the New Jersey corporation for the protection of its rights against the action of the defendants. The German corporation is a majority stockholder, practically the owner, of the New Jersey corporation. The charge is that the defendants deliberately set about to wreck the New Jersey corporation. No money decree is prayed for. If I should deny relief upon the ground stated by the defendants, then the property of alien enemies within this country, acquired in time of peace, may be ruthlessly taken away from them, not by the government, but by individuals, subject only to the restraint of criminal law. I am familiar of course with the very many learned opinions of publicists of other days, and also with the opinions of the Supreme Court of the United States, but I think that at this time to attempt to consider them in detail would unduly extend this opinion, and in the view that I take of the present situation would be wholly unwarranted. The right of government to confiscate property of alien enemies and close the doors of its courts to them, whether resident here or elsewhere, may be conceded. Whether that right is to be exercised is a matter of policy. The modern trend is to discourage interference with property rights, whether of friends or enemies, in time of war, except so far as may be necessary to effectively accomplish the objects of the war. The solution of the problem now before me, I think, is found in the President's message to Congress, which in view of the nature of its reception by Congress and the action of Congress under it has become the voice of the country; and the President's proclamation declaring a state of war and defining rights of residents, an official act under authority of Congress. German residents who comply with needful regulations and who properly conduct themselves are assured that they will be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and lawabiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States. shut the door of the court in the face of an alien enemy resident here would be a distinct violation of not only the spirit but the letter of this proclamation."

VALIDITY OF STATUTE REQUIRING STREET RAILWAY COMPANIES TO FURNISH FREE TRANSPORTATION TO POLICE OFFICERS.—Two cases involving the validity of a New Jersey statute requiring street railway companies to grant free transportation to police officers while engaged in the performance of their public duties claimed the attention of the United States Supreme Court in Sutton *v.* State, 37 Supreme Court Reporter 508. In each a prosecution for assault and battery was brought against an inspector employed by the Public Service Railway Company of Jersey City, for ejecting a city detective who refused to pay his fare. Both detectives were in plain clothes, but showed their badges and claimed the right to ride free of charge. Both detectives were on duty at the time,—one was on his way to report at headquarters; the other to interview the victim of a robbery. The defense in each case was the unconstitutionality of the statute and that the detective, having wrongfully refused to pay his fare, was ejected with no more than necessary force. The police justice before whom the prosecutions were instituted found the defendants guilty and fined them. These judgments were affirmed in successive appeals to the supreme court and to the court of errors and appeals of New Jersey. The cases were then carried to the United States Supreme Court on writs of error where the judgments below were affirmed but by a divided court, Justices McKenna and Pitney dissenting. The opinion of the majority of the court was by Mr. Justice Brandeis and read in part as follows: "Freedom to come and go upon the street cars without the obstacle or discouragement incident to payment of fares may well have been deemed by the legislature essential to efficient and pervasive performance of the police duty. Increased protection may thereby enure to both the company and the general public without imposing upon the former an appreciable burden. If any evidence of the reasonableness of the provision were needed, it could be found in the fact that such officers had been voluntarily carried free by the company and its predecessors for at least eighteen years prior to July 4, 1910, when the practice was prohibited by the Public Utilities Act (Pamph. Laws 1910, p. 58). In the following year such free transportation was expressly permitted (Pamph. Laws 1911, p. 29), and it was made mandatory by the act here in question. We cannot say that the requirement that city detectives not in uniform be carried free on street cars when in the discharge of their duties is an arbitrary or unreasonable exercise of the police power. Furthermore, the charter of the Railway Company was subject to alteration in the discretion of the legislature (N. J. Const. art. 4, § 7, par. 11; Pamph. Laws 1846, p. 17). The obligation to carry free city detectives engaged in the discharge of their duties is a burden far lighter than others imposed upon street-using corporations which have been sustained by this court as a valid exercise of the reserved power. The statute is broad in scope, extending also to all 'uniformed public officers;' but the court below expressly confined its decision to the case presented, sustaining the law 'in so far as it applies to police officers;' and our decision is likewise so limited."

INJURIES ARISING "OUT OF EMPLOYMENT" AS INCLUDING ACCIDENT CAUSED BY AMMONIA INSTEAD OF WATER BEING THROWN IN FACE OF FAINTING EMPLOYEE.—An interesting illustration of what constitutes an injury arising in the course of one's employment as distinguished from one arising "out" of such employment is furnished by the case of Saenger *v.* Locke, N. Y. 116 N. E. 367, wherein the facts showed that one Edna Saenger was a claimant for an award under the New York Workmen's Compensation Act, the claim being based on injuries received while working in a millinery shop. It appeared that she had some differences with the "boss" with regard to her work and as a result became nervous and hysterical and fainted. Two of her coemployees rushed to get water and ammonia. They returned, one with a glass of ammonia and one with a glass of water. In some way these glasses became mixed, and the ammonia was thrown into the face of Edna Saenger, causing injuries for which an award was made her. The Appellate Division of the New York Supreme Court affirmed the award, but the judgment of affirmance was reversed by the New York Court of Appeals, which said: "Clearly the injuries so received by her were accidental and arose in the course of her employment, but they did not arise out of such employment. If she had fainted because of fumes

present in the workroom, and so falling had injured herself, a different question would have been presented, but the claimant fainted because of her physical condition, and, even if her faintness might have been said to have resulted from a quarrel with her boss with regard to her work, the fainting was in no proper sense connected with the accident. The accident was caused by a co-employee mistaking the two glasses containing ammonia and water, and not because the ammonia was exposed and an error arose as to its nature or use. The employee who obtained it knew precisely what it was. The employer had not furnished the ammonia as medicine for his employees, nor had he authorized in any way its use by them as a medicine. A fainting such as is shown in this case and help such as was given is not a natural incident to the business. It has no more connection with it than if a physician had been called in and, having been handed glasses of ammonia and water, had made the same mistake. In Matter of De Fillippis *v.* Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761, *affirmed* 219 N. Y. 581, an employee was injured by being struck in the eye by scissors thrust through a partition by a fellow servant as a practical joke. Such an injury did not arise out of the employment. Where injuries result from quarrels between fellow servants, the rule is that where the quarrel arose out of matters pertaining to the business, then the accident arises out of the employment. Where the quarrel is an independent affair having no connection with the master's work, then it does not. Matter of Heitz *v.* Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. As is said in the case last cited, the injury must be received as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work. Such is not this case."

Effect of Federal Employer's Liability Act as Preventing Award under State Workmen's Compensation Act Against Interstate Carrier.—The exclusiveness of the Federal Employer's Act even to the point of preventing a state law from applying to injuries occurring without negligence is finally settled by the case of New York Central R. Co. *v.* Winfield, 37 Supreme Court Reporter 546. The facts in the case show that while in the service of a railroad company in the state of New York, James Winfield sustained a personal injury whereby he lost the use of an eye. At that time the railroad company was engaging in interstate commerce as a common carrier and Winfield was employed by it in such commerce. The injury was not due to any fault of negligence of the carrier, or of any of its officers, agents, or employees, but arose out of one of the ordinary risks of the work in which Winfield was engaged. He was a section laborer assisting in the repair of the carrier's main track, and while tamping cross ties struck a pebble which chanced to rebound and hit his eye. Following the injury he sought compensation therefor from the carrier under the Workmen's Compensation Law of the state and an award was made to him by the state commission, one member dissenting. The carrier appealed and the award was affirmed by the Appellate Division of the Supreme Court, two judges dissenting (168 App. Div. 351, 153 N. Y. Supp. 499), and also by the Court of Appeals (216 N. Y. 284, 110 N. E. 614, Ann. Cas. 1916A, 817). Before the Commission and in the state courts the carrier insisted that its liability or obligation and the employee's right were governed exclusively by the Employers' Liability Act of Congress (see 1909 Supp. Fed. Stat. Annot. 584), and therefore that no award could be made under the law of the state. That insistence was renewed in the United States Supreme Court and the result was a reversal of the judgment below by a divided court, Mr. Justice Brandeis writing a dissenting opinion in which Mr. Justice Clarke concurred. Mr. Justice Van Devanter for the majority of the court said: "It is settled that under the commerce-clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. Congress acted upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. By one side it is said that the act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws; and by the other side it is said that the act covers both classes of injuries and is exclusive as to both. The state decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in Winfield *v.* Erie R. Co., 88 N. J. L. 619, 96 Atl. 394, hold that the act relates only to injuries resulting from negligence, while the California court in Smith *v.* Industrial Acc. Commission, 26 Cal. App. 560, 147 Pac. 600, and the Illinois court in Staley *v.* Illinois C. R. Co., 268 Ill. 356, L. R. A. 1916A, 450, 109 N. E. 342, hold that it has a broader scope and makes negligence a test,—not of the applicability of the act but of the carrier's duty or obligation to respond pecuniarily for the injury. In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line. . . . Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several states require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no state is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in Prigg *v.* Pennsylvania, 16 Pet. 539, 617, 10 L. ed. 1060, 1089, 'if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.' Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the states from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it."

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"No one may do evil that good may come." Hunt, J., Jeffries *v.* Economical L. Ins. Co., 22 Wall. 52.

# New Books

*Science of Legal Method.* Select essays by various authors. Boston: The Boston Book Company. 1917.

This is volume 9 in the Modern Legal Philosophy Series, the various volumes of which are edited by a committee of the Association of American Law Schools, and published by the Boston Book Company. The particular book at hand has introductions by Henry N. Sheldon, a former justice of the Supreme Judicial Court of Massachusetts, and by John W. Salmond, Solicitor-General of New Zealand. There are two main divisions of the general subject treated, namely, the Judicial Function and the Legislative Function. The scope of these divisions is well stated in the editorial preface as follows: "The chapters of the first division—the Judicial Function—begin with the now celebrated utterances of Gény and Ehrlich on 'freedom of judicial decision,' —the two whose expositions awakened the entire Continent to the profound possibilities of the subject. These are followed by chapters in which Gmelin, Kiss, Berolzheimer, Kohler, Pound, Gerland, and Lambert have developed various principal aspects of the controversy,—notably the contrast between the English and the Continental judge, the subordination of the judge to legislative law, the scope of materials for judicial thought, the extent of judicial power of 'interpretation,' the doctrine of 'gaps in the law,' and the inherent logic governing judicial decision. The culmination is reached in Wurzel's chapter on 'Methods of Juridical Thinking.' He who has mastered this chapter has been born anew into a realm of clear thinking and perpetual disillusionment. The chapters of the second division introduce us broadly but concisely to the fundamentals of the legislative problem. There is, however, as yet, little literature of a thoroughgoing critical character in this field. The future must see more, and America, not code-ridden as the Continent is, but fertile in a spawning mass of incoherent legislation, is the natural and needful place for its development."

Professor Roscoe Pound's contribution is entitled "Courts and Legislation" and the substance of it was an address delivered before the American Political Science Association of Buffalo in 1911. This and a chapter by Professor Ernst Freund entitled "Scientific Method in Legislative Drafting" should particularly appeal to American legal scholars, since they were written by keen observers of our own institutions.

The publishers have left nothing to be desired as regards their part of the undertaking.

*Standards of American Legislation.* An Estimate of Restrictive and Constructive Factors. By Ernst Freund, Professor of Jurisprudence and Public Law in the University of Chicago. Chicago: The University of Chicago Press.

This book gives in somewhat expanded form the substance of a series of lectures delivered by the author at Johns Hopkins University in March, 1915. In the words of Professor Freund: "The origin of the book explains its character: it is an essay of constructive criticism, and not a systematic treatise. Its purpose is to suggest the possibility of supplementing the established doctrine of constitutional law which enforces legislative norms through ex post facto review and negation by a system of positive principles that should guide and control the making of statutes, and give a more definite meaning and content to the concept of due process of law."

The different chapters deal with the following subjects: Historic Changes of Policy and the Modern Concept of Social Legislation; The Common Law and Public Policy; The Tasks and Hazards of Legislation; Constitutional Provisions; Judicial Doctrines; The Meaning of Principle in Legislation; Constructive Factors. There is no chapter which does not bear evidence of much study and reflection in preparation and it is all very interesting. Certain changes suggested in our methods of legislation based in part on comparison with the methods employed in other countries warrant careful consideration.

*The Argentine Civil Code.* Together with the Constitution and Law of Civil Registry. Translated by Frank L. Joannini. Boston: The Boston Book Company. 1917.

This volume is an official publication of the Comparative Law Bureau of the American Bar Association and belongs to the Foreign Civil Code Series. The Argentine Civil Code was enacted in 1871 and we are told in an introduction by Mr. Phanor James Eder that "up to the present time only two laws amending the code have been passed." The Code Napoléon has served more or less as a model for all the South American Civil Codes, which follow it closely in most fundamental matters, but adopt a different method of classification and arrangement. The French Code divides its matter into three books, Persons, Things, and Modes of Acquiring Property, including succession and contracts, but the Argentine Civil Code divides its matter into four books. In Book I is included persons in general and personal rights in family relations; in Book II, personal rights in civil relations; in Book III, real rights, and in Book IV, successions. The code it is said is almost wholly lacking in originality, every article being definitely traceable to some pre-existing foreign code or commentator. There are over four thousand articles in the code. The constitution, also included in the volume, contains one hundred and ten articles. The code is valuable for comparative study and puts the legal scholar under obligation to the branch of the American Bar Association responsible for its publication.

*Essays in Jurisprudence and Allied Subjects.* By Jos. C. Higgins, member of the Tennessee Court of Appeals. Nashville, Tenn.: Marshall & Bruce Co. 1917.

The substance of the essays to be found in this little book of one hundred pages was put into writing at different times during the last few years, prompted, the author says, "by observation of and participation in the administration of justice and a study of cognate social questions." He admits that they "are necessarily fragmentary and must be treated as suggestive only." Nor does he claim that the subjects are new, but contends that his endeavor has been to impart something original to each one. The subjects treated include The Whyfore of Litigation; Jurisprudence as a Science; Persistence and Recurrence of Juridical Conceptions; Technicalities; Dignity of Litigation; Appeals; Argument of Counsel; Codification; Obliteration of State Lines; etc.

# News of the Profession

THE KANSAS STATE PROBATE JUDGES' ASSOCIATION held its annual convention at Hutchinson, Kan., on June 19.

THE NORTH DAKOTA BAR ASSOCIATION will meet in annual convention at Dickinson, N. Dak., on August 16 and 17.

NAMED PROBATE JUDGE.—Claude C. Ritze of Iron River has been appointed by Governor Sleeper of Michigan as judge of probate to succeed Edward P. Lott, deceased.

ILLINOIS JURIST DEAD.—Arthur H. Frost, for the past fifteen years a judge of the Illinois Circuit Court, seventeenth circuit, died at Rockford, Ill., on June 18, aged 62 years.

OHIO JUDICIAL APPOINTMENT.—Governor Cox of Ohio has appointed Hubert C. Pontius of Canton as the third resident common pleas judge in Stark County, a judgeship created by the last legislature.

NEW OREGON JUDGE.—Governor Withycombe of Oregon has appointed Fred W. Wilson of The Dallas to the bench of the Circuit Court for the seventh judicial district to succeed the late Judge W. L. Bradshaw.

MADE MEMBER OF CIVIL SERVICE COMMISSION.—Randolph W. Walton, a well known Columbus attorney, has been appointed a member of the Ohio Civil Service Commission to succeed Dr. Campbell of Ada, resigned.

INDIANA BAR ASSOCIATION.—The twenty-first annual meeting of the Indiana Bar Association was held at Indianapolis, Ind., on July 11 and 12. LAW NOTES for September will make further mention of the meeting.

DEATH OF WELL KNOWN MICHIGAN ATTORNEY.—William D. Gordon, formerly speaker of the Michigan House of Representatives, and United States district attorney from 1899 to 1903, died at Bay City, Mich., on June 20, aged 59 years.

OHIO STATE BAR ASSOCIATION.—The thirty-eighth annual meeting of the Ohio State Bar Association was held at Cedar Point, Ohio, on July 10, 11, and 12. Further details will be given in LAW NOTES for September.

APPOINTMENT TO BENCH IN PENNSYLVANIA.—Charles E. Berger of Shamokin has been appointed by Governor Brumbaugh of Pennsylvania to the bench of the Court of Common Pleas of Schuylkill county to succeed Judge Charles N. Brumm, deceased.

EX-GOVERNOR BECOMES LAW TEACHER.—Herbert S. Hadley, former governor of Missouri and for years a prominent figure in national Republican politics, has accepted a professorship in the law school of the University of Colorado.

APPOINTED TO LOUISIANA SUPREME BENCH.—Paul Leche, formerly judge of the Court of Appeal of the First Circuit, has been appointed an associate justice of the Louisiana Supreme Court, succeeding the late Associate Justice Alfred D. Land.

THE IOWA DISTRICT JUDGES' ASSOCIATION met in annual session at Council Bluffs, Iowa, on June 29. The following officers were elected: President—Thomas Arthur Logan; vice president—John W. Kintzinger of Dubuque; secretary and treasurer—Shelby Cullison of Harlan.

APPOINTED AIDE TO ATTORNEY GENERAL.—Guy D. Goff of Milwaukee, formerly United States district attorney for the eastern district of Wisconsin, has been appointed special assistant to the attorney general of the United States, with headquarters at Madison, Wis.

THE IOWA COUNTY ATTORNEYS' ASSOCIATION elected the following officers at its annual convention held at Council Bluffs, Ia., on June 28: President—C. E. Swanson of Council Bluffs; vice president—J. E. Burnstedt of Webster City; secretary and treasurer—T. C. Whitmore of Atlantic.

DEATH OF NOTED LOUISIANA LAWYER.—Garvin D. Shands, lieutenant governor of Mississippi from 1880 to 1888, dean of the law school of the University of Mississippi from 1894 to 1906, and professor of common law at Tulane University from 1906 to 1910, died at New Orleans, La., on July 1, aged 71 years.

THE MICHIGAN ASSOCIATION OF PROBATE JUDGES met in annual convention at Portage Point, Mich., on June 30. Officers for the ensuing year were elected as follows: President—Clark E. Higbee of Grand Rapids; vice president—Samuel H. Van Horn of Kalamazoo; secretary and treasurer—A. N. Ganschow of Saginaw.

ALABAMA BAR ASSOCIATION.—The Alabama Bar Association held its fortieth annual meeting at Birmingham, Ala., on July 12, 13 and 14. Judge Joseph H. Nathan of Sheffield delivered the president's address, and the annual address was made by Judge H. G. Connor of the United States District Court for North Carolina, whose subject was "The Life and Times of John A. Campbell."

FORMER JUSTICE MOODY DEAD.—William H. Moody, former associate justice of the United States Supreme Court, died at Haverhill, Mass., on July 2, at the age of 64 years. Mr. Moody was Secretary of the Navy and Attorney General in the cabinet of President Roosevelt and was appointed to the Supreme bench in December, 1906. He retired as a member of that court in 1910, because of illness.

TEXAS BAR ASSOCIATION.—The thirty-sixth annual meeting of the Texas Bar Association was held at Houston, Tex., on July 3, 4, and 5. The official program contained the following addresses: President's address, by Frank C. Jones of Houston; "The Dignity of Rules and Forms in Appellate Procedure," by J. M. Burford of Mount Pleasant; "The War and the Constitution, by G. B. Rose of Little Rock, Ark.

DEATH OF SENIOR MEMBER OF INTERSTATE COMMERCE COMMISSION.—Judge Judson C. Clements of the Interstate Commerce Commission died at Washington, D. C., on June 18, at the age of 71 years. Judge Clements was a native of Georgia and represented that state in Congress for ten years, retiring voluntarily in 1891 to accept a place on the commerce commission. He was the oldest member of the commission in point of service.

NEW JERSEY STATE BAR ASSOCIATION.—The annual meeting of the New Jersey State Bar Association was held at Atlantic City, N. J., on June 15 and 16. Judge Frederick W. Gnitchel of Trenton delivered the president's address. Other speakers were as follows: Governor Walter E. Edge of New Jersey; Judge John M. Patterson of Philadelphia; Professor John H. Wigmore, dean of the Northwestern University; and Frank Bergen of Elizabeth.

MAINE CHIEF JUSTICE DEAD.—Chief Justice Albert R. Savage of the Supreme Judicial Court of Maine, died at Auburn, Me., on June 14. He was in the seventieth year of his age and had been on the Supreme bench since 1897, and Chief Justice for four years. Justice Savage was a native of Ryegate, Vt., and was graduated from Dartmouth College in 1871. From 1885 to 1889 he was Judge of Probate Court of Androscoggin County, and in 1893 was Speaker of the Maine House of Representatives.

WISCONSIN BAR ASSOCIATION.—At its recent annual convention held in Madison, Wis., the Wisconsin Bar Association elected the following officers: President—Associate Justice R. D. Marshall of the Wisconsin Supreme Court; secretary and treasurer—George E. Morton of Milwaukee; assistant secretary—Arthur A. McLeod of Madison. Sixteen of the twenty vice-presidents were re-elected. The four new vice-presidents are William H. Timlin of Milwaukee, L. J. Nash of Manitowac, T. H. Ryan of Appleton, and E. C. Eastman of Oconto.

IOWA STATE BAR ASSOCIATION.—The twenty-third annual meeting of the Iowa State Bar Association was held at Council Bluffs,

Ia., on June 28 and 29, with William McNett of Ottumwa presiding. The address of welcome to the visiting attorneys was given by Emmet Tinley, president of the Pottawattamie County Bar Association, and was responded to by Judge Thomas Arthur of Logan. Other addresses were as follows: "Education and Americanism," by United States Judge Martin T. Wade of Iowa City; "The Webb-Kenyon Law and Beyond," by D. O. McGivney, dean of the Iowa State University; "Benjamin Franklin," by Burton E. Hanson of Chicago, general counsel for the Chicago, Milwaukee and St. Paul Railroad Company. The following officers were elected: President—Charles W. Mullan of Waterloo; vice-president—Henry L. Adams of Des Moines; secretary—H. C. Horack of Iowa City; treasurer—Leonard T. Carney of Marshalltown.

MARYLAND STATE BAR ASSOCIATION.—The twenty-second annual meeting of the Maryland State Bar Association was held at Atlantic City, N. J., on June 21, 22, and 23. Joseph C. France of Baltimore delivered the president's address. Other addresses were made by Dr. Frank J. Goodnow, president of the Johns Hopkins University; by Judge Wilson Temple, member of Congress from Pennsylvania; by Senator Pat Harrison, of Mississippi; by Hon Roscoe Pound, dean of the Harvard Law School, and by Oscar Leeser, and other members of the Maryland association. Officers were elected as follows: President—John B. Gray, Prince Frederick; vice presidents—Henry L. Constable, Elkton; John Mays Little, Towson; A. A. Doub, Cumberland; I. Milton Reifsnider, Westminster; Charles M. Mathias, Frederick; T. Howard Duckett, Bladenburg; Randolph Barton, Jr., Baltimore City; Walter H. Buck, Baltimore county; secretary—James W. Chapman, Jr.; treasurer—R. Bennett Darnall; executive council—William P. Lyons and Eli Frank, Baltimore city; Ridgely P. Melvin, Annapolis, and Henry M. McCullough, Elkton.

PENNSYLVANIA BAR ASSOCIATION.—The twenty-third annual meeting of the Pennsylvania Bar Association was held at Bedford Springs, Pa., on June 26. The president's address was delivered by Cyrus G. Derr of Reading, his subject being "Philosophy of Lawmaking." The subject of the annual address, delivered by Henry D. Estabrook of New York, was "The Constitution between Friends." Other addresses were as follows: "Two Views of the Legal Effect of Contributory Negligence," by Henry Budd of Philadelphia; "John G. Johnson," by former Attorney General Hampton L. Carson of Philadelphia; "Public Utilities," by John S. Rilling of Erie. The following officers were elected: President—William A. Staake, judge of the court of common pleas of Philadelphia; vice presidents—Charles E. Whitten, Westmoreland; Arthur G. Dickson, Philadelphia; E. C. Chalfant, Allegheny; Nicholas M. Edwards, Lycoming; James I. Brownson, Washington; treasurer—Samuel E. Bashore, Cumberland; secretary—Howard B. Beitler, Philadelphia.

THE MICHIGAN STATE BAR ASSOCIATION held its twenty-seventh annual meeting at Grand Rapids, Mich., on June 29 and 30. Burritt Hamilton of Battle Creek delivered the president's address. Other addresses were as follows: "The Cost of Public Justice," by Professor John R. Rood of the University of Michigan; "Our Increasing National and International Responsibilities," by Atlee Pomerene, United States Senator from Ohio; "Recent Michigan Legislation of Special Interest to Lawyers," by Seymour H. Person of Lansing. Woodbridge N. Ferris, a former Governor of Michigan, and Lawrence Maxwell of Cincinnati, former United States attorney general, also spoke. The following are the officers for the coming year, re-elected: President, Burritt Hamilton of Battle Creek; vice president—Dallas Boudeman of Kalamazoo; secretary—Harry A. Silbee of Lansing; treasurer—William E. Brown of Lapeer; board of directors—William P. Beldon of Ishpeming of the twelfth congressional district, new member; First district, James Turner of Detroit; Second, Henry Bates, Ann Arbor; Third, Claude S. Carney, Kalamazoo; Fourth, Thomas J. Cavanaugh, Paw Paw; Fifth, William J. Landman, Grand Rapids; Sixth, Walter S. Foster, Lansing; Seventh, Lincoln Avery, Port Huron; Eighth, George Pardee, Owosso; Ninth, Parm C. Gilbert, Traverse City; Tenth, H. M. Gillet, Bay City; Eleventh, Sherman T. Handy, Sault Ste. Marie; Thirteenth, Adolph Sloman, Detroit.

## English Notes

MARRIAGE UNDER SENTENCE OF DEATH is unknown in Great Britain, but a case was recorded during the Irish rebellion, one of the leaders going through the ceremony with the lady to whom he was engaged. A few weeks ago Captain Estève, of the colonial regiment, was condemned to death by a *conseil de guerre* in Paris for treason. After the condemnation he was taken to the *mairie* of the 14th arrondissement by a body of police, where was awaiting him a lady, with whom he had obtained permission to enter into a contract of marriage. The ceremony terminated, Captain Estève was conducted by the police from the *salle des mariages* to the *prison de la Santé.*

FOOD PROFITEERING.—For some considerable period the general public has been waiting for the Ministry of Food to take steps for dealing with the rise in the essential commodities of food. That department has been assiduous almost day by day in inundating the country with orders and regulations, one effect of which seems to have been a steady rise of prices. We are therefore glad to note that the Prime Minister announces that "the Cabinet has already started a very searching investigation of that subject [profiteering], and they hope in a very short time to make proposals which will have the effect of reducing very substantially the cost of some of the necessities of life to the people of this country." One is quite aware of the complexities of modern food production, but, at the same time, one cannot help being convinced that excessive profits are being made at one stage or another, and this should be prevented with the utmost stringency.

THE EPIGRAMS OF LORD SUMNER.—In the art of expounding legal principles with an admirable lucidity and with epigrammatic force and humor Lord Sumner has had few rivals in the past, and at the moment has no equal on the bench. Indeed, a perusal of his judgment affords the best refutation of the too commonly accepted notion that legal science is dry and uninteresting, and it is worthy of note that these expositions of his were marked by the same high qualities even when delivered extemporaneously, as all his judgments were when he was sitting as a puisne judge of the King's Bench Division. During that brief period he never once "took time" to consider his judgments; even in the most complicated of revenue cases, involving the consideration of numerous statutes and authorities, he invariably delivered judgment immediately on the conclusion of the argument. His latest judgment, that in Bowman *v.* Secular Society Limited, is packed with epigrams, but epigram that is at the same time argument. In his protest against the rhetorical statement that "Christianity is part of the law of England," he was

curiously anticipated, however, by Robert Monsey Rolfe, afterwards Lord Chancellor Cranworth, who, hearing on one occasion someone declare that "Christianity is part and parcel of the law of the land," turned to his friend Crabb Robinson and asked, "Were you ever employed to draw an indictment against a man for not loving his neighbor as himself?" When thus reduced to plain prose, the unreality of the phrase is clearly demonstrated.

Mr. Choate and the English Bar.—The Lord Chief Justice, in an appreciation and panegyric delivered from the bench, gave expression in language of dignity and of feeling befitting the occasion to the sincere regret of the legal profession in England at the death of Mr. Choate, whose eminence at the American Bar both as an advocate and a jurist brought him when ambassador for the United States at the Court of St. James's into terms of very special friendship and sympathy with the members of the Bar and Bench of England, where he was the recipient of the compliment of being elected a Bencher of an Inn of Court. The associations of the English Bar with America are naturally strengthened by community of blood and language and by the fact that the treasures and wisdom of English jurisprudence are in large measure the inheritance in common of both nations. It is pleasant to think that the late Mr. Benjamin, the learned author of the standard work Benjamin on Sales, when the destruction of his political ideas and ambitions at the conclusion of the American Civil War made him an exile from his country, determined to begin a new forensic career in England in which he attained the very highest eminence and was given, in recognition of his abilities and learning, a patent of precedence. The withdrawal, as in the case of Mr. Choate, from the Bar of America to fill a high diplomatic position, though unusual, is not without precedent in Great Britain. Thus Paul Methuen, as Master in Chancery in England became ambassador to Portugal, was transferred from that position to the Lord Chancellorship of Ireland, and in 1703 became again ambassador to Portugal, whence he concluded in 1707 the commercial treaty known as the Methuen Treaty. The Right Hon. Richard Laler Shiel, Q. C., famous in the forties of the last century as a dramatist, a leader of the Irish Bar, and a Parliamentary orator, accepted eventually the position of British Ambassador at Florence.

Dependency on a Workman's Weekly Earnings.—The novel and important question that was raised in the recent case of Simms *v.* Lilleshall Colliery Company Limited may thus be formulated: When determining whether a female member of a workman's family was "wholly" or "in part" dependent upon the earnings of the workman at the time of his death through an "accident arising out of and in the course of" his employment, within the meaning of section 1 of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), can there be taken into consideration the possibility of that member being able to support herself if she had not resided with, and toiled for, the workman? In the present case, the learned County Court judge stated his view of the law to be that an applicant might be dependent even though he could have maintained himself without the assistance of the earnings of the deceased workman. But His Honor was of opinion that he was not compelled by law to hold that the applicant was "wholly" dependent on her father's earnings at the time of his death merely because she preferred to earn and to be provided with, and in fact did earn and was provided with, her board, lodging, maintenance, clothing, and pocket money out of her father's earnings, though she could easily have earned and provided herself with the same in employment elsewhere. By taking this original view of the position of affairs, the learned County Court judge had, in the opinion of the learned judges of the Court of Appeal, exceeded what he was entitled to do. He had no right to consider, said Lord Cozens-Hardy, M. R., anything else but whether in fact the daughter was "wholly" dependent on her father's earnings, or whether she had any other source of income. It was quite irrelevant for His Honor to inquire whether the daughter could have supported herself, as was said in the Scottish case of Moyes *v.* W. Dixon Limited (7 F. 386; 42 Sc. L. Rep. 319). But he had deemed it was competent for him, in dealing with the distinction drawn by section 13 of the Act, and by section 1, sub-section (a) (i) (ii), of the first schedule thereto, between being "wholly" and "in part" dependent, to consider the physical capacity of the daughter to earn her own living. He had thought he was at liberty to take into account the daughter's physical capacity, and to find that as she was strong and healthy she could maintain herself with ease. Matters were consequently taken into consideration which it was not permissible to be so taken. And thereby he misdirected himself on a matter of law.

An Infant's Choice.—Mr. Justice Neville had a difficult point to decide in the recent case of Re May, but the robust common sense which this learned judge displays helped him to cut the Gordian knot. The testatrix was apparently a Protestant with a strong antipathy to the Roman Catholic branch of the Christian faith. Her brother was a Roman Catholic, and his son, Michael, had been baptized as a Roman Catholic and was being brought up as one. At his aunt's, the testatrix's death, Michael was nine years old. By her will she directed £5000 to be invested and accumulated and the income paid to Michael on his attaining the age of twenty-four years during his life, provided that he should not be a Roman Catholic at her death, "or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death." "Most men think all men mortal but themselves," and this testatrix may have thought that she would not die before her nephew had attained his majority. It is not the kind of legacy which inspires noble conduct, and it would be difficult to admire any one who gave up his particular form of faith in order to secure a pecuniary benefit. In such a case the intended legatee has to elect between his convictions and the gift under the will. But how can a boy of nine years elect? "An infant cannot elect, and in those cases in which an infant, if adult, would have to elect, the ordinary practice is to direct an inquiry whether it is to his advantage to take under or against the will. But in some cases the infant has been allowed to postpone his election until he comes of age" (Jarman on Wills, 6th edit., p. 554). The court can decide how a child is to be brought up, but cannot decide on the child's convictions. It can decide which of two estates it would be to the interest of the infant to take, but there is no means by which the court can decide the delicate question as to which is the greater benefit of the infant, to hold what the testatrix (possible erroneously) thinks to be an incorrect form of faith or to acquire the income of a substantial sum of money. Can a child of nine or ten years have settled convictions at all? It may, of course, be urged that if the testatrix has imposed a condition precedent which the intended legatee cannot perform, the gift ought to fail. The learned judge, however, took a wider view, and held that until the child attained twenty-one he could not in the eyes of the court be said to be, or not to be, a Roman Catholic, so that, though twelve months had expired since the testatrix's death, the benefit had not been forfeited by the infant.

Injured Railway Porters and Their Gratuities.—Unless the Court of Appeal were disposed to overrule their decision in

Penn *v.* Spiers and Pond Limited (98 L. T. Rep. 541; (1908) 1 K. B. 766), the appeal in the recent case of Helps *v.* Great Western Railway Company was foredoomed to failure. The possibility of distinguishing the gratuities accepted by the railway porter in the latter case from those handed to the waiter in the restaurant car on the railway in the former was practically hopeless. So that, in so far as the Court of Appeal were concerned, the decision was almost certain to be in favor of the workman. That is to say, his "average weekly earnings" in Helps' case (ubi sup.) were bound to be treated as augmented to the extent of the cash which he received in the shape of "tips," because in Penn's case (ubi sup.) the same had been held to be an item falling within the computation of such earnings. And it is common knowledge that the computation is required to be made in order to determine the amount of the compensation which is payable by an employer to his workman who has suffered "personal injury by accident arising out of and in the course of" his employment, within the meaning of section 1 of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58). The directions contained in sections 1 and 2 of the first schedule to that act have to be strictly complied with. In Penn's case (ubi sup.), Lord Cozens-Hardy, M. R., in delivering the written judgment of the Court of Appeal, consisting of himself and Lords Justices Fletcher Moulton and Buckley, laid down the law on the subject. His Lordship thus clearly expressed the view that the court entertained: The measure of compensation under the act being earnings, not wages, and although not every kind of earnings can be taken into account, yet where the employment is of such nature that the habitual giving and receiving of gratuities is open and notorious and sanctioned by the employer, so that he could not complain of the retention by the workman of the money thus received, the same ought to be brought into account in estimating the "average weekly earnings" of a workman. The learned judge was careful, however, to point out that there is no ground for insisting upon an express or direct contract as to the retention of gratuities, in the sense that it must be proved that the workman said before he was engaged that he would accept the wages offered only on the express condition that he should be allowed to retain gratuities; but it is, at any rate, sufficient if the court finds that it was an implied term of the contract, and that both parties contracted on that footing.

Exoneration of Testator's Personal Estate from Payment of Debts.—A question which not infrequently perplexes the practitioner is out of what fund a testator's debts ought to be paid when he has charged them upon a particular part of his personal estate. Is that sufficient to exonerate the residuary personal estate from its primary liability to pay debts? The question seems to depend on whether the will contains an effective bequest of the residuary personal estate, or whether the testator has died intestate as to it. The rule is, that it is not sufficient to exonerate personal estate from its primary liability to pay debts that some other property is expressly charged with the payment; but an express intention, not only to charge the other property but also to exonerate the personalty, must be gathered from the will. The balance of authority is in favor of the proposition that where there is a residuary bequest, which does not fail by lapse or otherwise, the fact that a specific portion of the personal estate is charged with debts is not sufficient to show that such specific fund is primarily liable to the payment of them in exoneration of the residuary personal estate (see Browne *v.* Groombridge, 4 Mad. 495; and Choat *v.* Yeats, 1 J. & W. 102). As pointed out in Jarman on Wills, 6th ed., vol. 2, p. 2078, by Charles Sweet and C. P. Sanger, the doctrine of those authorities seems to be more reasonable than that of the decisions to the contrary, such as Halford *v.* Wood (4 Ves. 76), for, although where a testator subjects real estate to charges to which the personal estate, and most frequently that only, was before liable, there is no reason why the added fund should be applied before the original one; yet, in regard to personal property, the whole of which was antecedently applicable to debts, as additional security to the creditor could not be the object of the provision, the natural inference is that the testator, in appropriating for this purpose a particular portion of that estate, intended that it should be primarily applied. If, however, the testator dies intestate as to his residuary personal estate, then the mere charge of debts on a specific portion of the personal estate will not exonerate the general personal estate, as to which there is an intestacy, from its primary liability to pay the debts (see Hewett *v.* Snare, 1 DeG. & Sm. 333). There a testator bequeathed to his wife absolutely all his household furniture and other articles in his dwelling house, and certain shares in a company, and his book-debts, charged with the payment of a legacy of £50, and his debts, funeral and testamentary expenses. He then made certain other specific and pecuniary bequests, but no residuary bequests. It was held by Vice-Chancellor Knight-Bruce that, notwithstanding the charge, the undisposed of residue was first applicable for payment of debts. The principle was also applied in Higgins *v.* Dawson (85 L. T. Rep. 763; (1902) A. C. 1), and see Ingpen on Executors, 2d ed., p. 559. Higgins *v.* Dawson should be noted up in Theobald on Wills, 7th ed., p. 828, which refers only to the report of that case in the Court of Appeal.

DELAWARE CHARTERS
IMPORTANT AMENDMENTS
TO THE DELAWARE LAW (March 20, 1917).
STOCK WITHOUT PAR VALUE
The most modern and scientific method of corporate organization. Write for full particulars of this and other important amendments.
REVISED DIGEST (4th Ed.) free to lawyers on request
CORPORATIONS ORGANIZED AND REGISTERED.
LAW AND FORMS FREE.
Corporation Company of Delaware
EQUITABLE BUILDING, WILMINGTON, DEL.

## Obiter Dicta

Not Jack Frost.—Jack *v.* Cold, 114 Iowa 349.

The Morning After.—Coffey *v.* Gay, 191 Ala. 137.

Who Doesn't?—Knock *v.* Railroad Co., 38 Nev. 143.

Married in Haste?—Hurry *v.* Hurry, 138 La. 391, was an action for a divorce.

A Good Joke Spoiled.—People *v.* Penman, 271 Ill. 82, was a prosecution for murder, not for forgery.

Working in Shifts?—"One man's liberty ends where another man's liberty begins."—Per Wanamaker, J., in Jackson *v.* Berger, 92 Ohio St. 141.

Intestinal Humor.—"It was once the fashion in court and out to refer to statutes of limitations much the same way that polite folk now refer to their bowels, to wit, only by way of derogation and complaint."—See Dudley *v.* Clark, 225 Mo. 586.

BECAUSE THE MINDS DON'T MEET.—"Marriage, though one of the most important and common of all contracts, is very often followed by disappointment of one or the other of the parties and often by both."—Per O'Brien, J., in Kramer *v.* Kramer, 181 N. Y. 483.

IN ACCORDANCE WITH THE POPULAR IDEA.—"The construction of this part of the will is certainly difficult and doubtful; and I must say that I think the person who drew it, whether lawyer or not, exhibited great skill in creating doubts and difficulties even in using the most direct and apt words."—Per Sutherland, J., in Hunter *v.* Hunter, 31 Barb. 334.

TAKING NO CHANCES.—A reliable correspondent in Canada writes us that in looking over an application for the probate of a will recently he discovered the following clause: "In case of mental incapacity of myself at any time hereafter this will shall be null and void and effective only in case of death." Doubtless, if the testator had had the word "ambulatory" in his vocabulary, he would have solemnly declared his will to be of that nature.

THE REASON.—Smith *v.* Smith, 185 Mich. 172, was an action by a married woman against her mother-in-law to recover damages for an unprovoked assault. It seems that, as usual, the defendant didn't like the way her daughter-in-law was bringing up her child. The jury gave the plaintiff a verdict for $10,500, but the appellate court cut the verdict down to $5,500. It is a safe bet that there were more married men on the jury than on the bench.

THE SHOE ON THE OTHER FOOT.—"The law seems more tender of the female than of the male, for no statute condemns a woman for having seduced a man from the paths of virtue. Probably this is because of legislative recognition that ordinarily the male is likely to be the aggressor. It is a matter of common knowledge, however, that this is not so always, and many a youth has been led astray by the blandishments of fair women." —Per Ladd, J., in State *v.* Valvoda, 170 Iowa 102.

A MEMORY LIKE THAT OF A TRUST MAGNATE.—"While it may be that the jury would not have given full credit to this testimony, especially in view of the fact that the witness had stated, at the beginning of this cross-examination, that he could not remember whether he had ever spent a few days in Queens county jail or not, yet the evidence in behalf of the defendant raised an issue of fact which he was entitled to have submitted to the jury."—See Newtown *v.* Lyons, 11 N. Y. App. Div. 108.

A NEW GROUND FOR DIVORCE.—According to a notice published in the *New York Times* on June 29 last, the father-in-law is beginning to usurp the place usually occupied by the mother-in-law as a trouble maker in the family. The notice was as follows:

Justice Hendrick of the New York Supreme Court, sitting in New York County, has just granted an absolute divorce to Mrs. Ora Manning Hill from her husband, Dudley S. Hill, son of Dr. Charles G. Hill, on the grounds of the latter's marital infidelity. The offense for which the divorce was granted was committed in New York city, August the fourteenth, 1916.

THE WRONG KIND.—In Missouri, etc., R. Co. *v.* Truskett, 2 Ind. Terr. 633, an action for damages for delay in the transportation of live stock, the court briefly disposed of one of the assignments of error as follows: "The contention of appellant is that the fall of heavy dew is an act of God, which should relieve a common carrier from its liability. We cannot concur with appellant in this contention. Had the dew been of that brand well known as 'Mountain Dew,' it might have affected the engineer and fireman, but not the engine or corporation itself, to the extent of relieving it from the obligation of its contracts."

PIGS IS PIGS.—"The raising of pigs is a perfectly lawful and respectable business. Doubtless it will remain so as long as the human palate craves the thin cut of juicy ham and the crisp slice of breakfast bacon. With all the marvelous advance in the science of animal husbandry which has taken place in recent years, we have not yet produced the odorless pig. He may come at some future time, in company with the voiceless cat and the flealess dog; but he is not yet in sight. Whenever he comes he will be welcome; but in the meantime pigs will be pigs, and we must put up as best we may with the odorous pig and his still more odorous pen."—Per Winslow, C. J. in Clark *v.* Wambold (Wis.), 160 N. W. Rep. 1039.

JUDICIAL SLANG.—We are shocked, not to say pained, to discover the dignified Wisconsin Supreme Court lapsing into slang. In Rigby *v.* Herzfeld-Phillipson Co., 160 Wis. 228, it appeared that a boy employed in a department store caused the arrest of a woman shopper as a shoplifter, and the woman brought suit for damages against the proprietors of the store. In the course of its opinion the court gravely remarked: "The boy appears to have been overofficious and 'vocal out of all proportion' to his age and position. Whether his conduct was the result of a crude attempt to obtain recognition and advancement or was the result of what Thomas Jefferson calls a 'plenitude of puppyism' we need not inquire. These are not uncommon stains on the shining garment of youth—the stigmata of puerility. . . . The fresh young man was discharged with reasonable promptness."

POETIC JUSTICE.—In Dietzel *v.* State, 132 Tenn. 47, a prosecution for murder, the court affirmed a sentence of death on the following ground among others: "What could have drawn the plaintiff in error to this lonesome lane on the days following the crime, except that mysterious and proverbial force that impels a murderer to return to the scene of his iniquity, or to the place where he has hidden his victim? Why should the prisoner have haunted this vicinity, as long as he was free, unless like that other murderer:

"'All night he lay in agony,
From weary chime to chime,
With one besetting horrid hint,
That racked him all the time;
A mighty yearning like the first
Fierce impulse unto crime.

One stern, tyrannic thought, that made
All other thoughts its slave;
Stronger and stronger every pulse
Did that temptation crave,
Still urging him to go and see
The Dead Man in his grave.'"

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"To protect the weak and ignorant from imposition by the strong and intelligent is the exercise of a high-minded honesty and 'the crowning glory of courts of equity.'" Per Thomas, J., in Kirby *v.* Arnold, 191 Ala. 263.

**PATENTS**

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WATSON E. COLEMAN,

PATENT LAWYER 624 F Street, N. W., Washington, D. C.

# Law Notes

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### Uniform Legislation.

ONE of the most exasperating hindrances to business in the United States is the diversity of the laws of the various states in which every large establishment must transact business. To overcome this evil the Committee of the American Bar Association on Uniform State Legislation has worked diligently and has achieved slow but steady results. At the meeting of the Bar Association held on September 4th, the Committee will present a report showing the adoption of uniform measures during the past year as follows: Warehouse Receipts, 5 states; Bills of Lading, 5 states; Marriage License, 1 state; Land Registration, 3 states; Stock Transfer, 1 state; Workmen's Compensation, 2 states; Extradition, 3 states; Sales, 3 states; Partnership, 4 states; Negotiable Instruments, 2 states. While the Committee does not sum up the results of its efforts in past years, it may be noted that the uniform Negotiable Instruments Act, first presented in 1896, has been adopted in all but four states, while the Warehouse Receipts Act, perfected ten years ago, has been made law in thirty-one states. Referring to its work the Committee says: "The actual passage of uniform acts by the legislatures does not, however, represent the whole of the accomplishment. This discussion by the members of your committee and by the Commissioners on Uniform State Laws in the respective states, with members of the legislatures and of their committees, and with state officials, with the heads of organizations which co-operated with the Conference of Commissioners and with your committee, serves to inform and educate an ever-widening circle and to enlist an ever-increasing number in the body of those who recognize the usefulness if not the absolute necessity of uniform state laws. Your committee has yet to find anyone who, after intelligent investigation of the subject, has not become a warm partisan on the side of such uniformity."

### Lack of Uniform Interpretation.

THE fly in the ointment of uniform legislation is the impossibility of securing a uniform interpretation of the legislative provisions. For example, it is provided in the Uniform Negotiable Instruments Act that a bona fide purchaser takes the instrument free from defenses available to the parties. It would seem that this provision would set definitely at rest the rights of a bona fide holder of a note given for a gaming consideration. But in *Bank* v. *Jacobs,* 74 W. Va. 525, it was held that the provision of the act had no application to such a note, the court saying:

"The legislature was dealing, at the time of the passage of the act and in the passage thereof, with the matter of negotiability of paper which the law allowed men to put on the market and the courts to enforce. It was not then considering the subject of gaming to which it had previously given its careful attention, nor acting upon it. The act does not mention it, nor did any provision thereof suggest it to the legislative mind. Any presumption that any member of the legislature, while considering or acting upon the bill, had the slightest suggestion or intimation from any of its terms, that it would, in any sense or to any degree, legalize gambling debts, would be a most violent one."

In like manner a conflict of authority has long existed as to the validity of a provision for attorneys' fees in a promissory note. The Negotiable Instruments Law provides that such a provision does not impair the negotiability of a note. Short of an express declaration it is hard to see how the validity of the stipulation in question could be more clearly recognized. Such an effect was given to the act in *Florence Oil, etc., Co.* v. *Hiawatha Gas, etc., Co.,* 55 Colo. 378, but the weight of authority is to the effect that the provision of the act has no effect on the validity of such a stipulation (*Holly Grove Bank* v. *Sudbury,* 121 Ark. 59; *Miller* v. *Kyle,* 85 Ohio St. 186; *Raleigh County Bank* v. *Poteet,* 74 W. Va. 511) and the original conflict continues unabated.

The members of the Bar Association Committee on Uniform State Laws are of course alive to this situation, and in their report for the current year they summarize their efforts toward securing uniform interpretation, and add: "We say without qualification that the courts have received the advances of the Conference and of your committee in this regard with the utmost cordiality and in many instances with gratitude, and have, without exception, made no unfavorable comment on the work, its purpose, and upon the suggestions which we have ventured to make to them in this regard, but quite the contrary."

### Literary Property in Pseudonym.

A NOVEL and interesting question was decided recently by President Judge Barratt in the Common Pleas Court at Philadelphia. It appeared that the plaintiff for a long period edited a column in a newspaper, signing always a pseudonym adopted by him. After his connection with the paper was ended the column was continued

by another writer, and the same signature appended. An injunction was granted, protecting the pseudonym as the personal literary property of the plaintiff. A somewhat similar question was passed on in the "Mark Twain Case" (14 Fed. 728). And in the English case of *Landa* v. *Greenberg,* 52 Sol. J. 354, the right of the plaintiff to the pseudonym "Aunt Naomi" used by her in conducting a Children's Department of a newspaper was protected. On the other hand, as was pointed out by Judge Barratt in his opinion, if the pseudonym is not personal but descriptive of a department or a character, no property right in the writer or artist exists. Of this character was the "Buster Brown" case (146 Fed. 204). The conclusion reached by the learned judge was not only fortified by him with an abundant collection of authority, but rests on solid considerations of justice. It is a matter of common knowledge that if a literary name acquires any distinctive repute it is by reason of the unique ability of the man who first used it. To permit it to be retained by the publication would not only deprive him of his literary good will, but would assist in a fraud on the reading public. It is good will of a personal and unassignable nature like that of a professional man, not a commercial good will of brands or processes of manufacture which can be transmitted to a successor.

**Power over Aliens.**

ASIDE from the power to intern alien enemies, and the power to prosecute for a violation of statutory regulations, there has been considerable discussion of the scope of the power of the government over alien enemies domiciled in the United States, as is indicated in the article by Henry W. Forster to be found in another column. From the fact that treason is a crime involving a breach of allegiance it has been said in the press that an alien enemy cannot be guilty of treason, but the contrary is well settled. The doctrine of temporary allegiance was well stated by Mr. Webster while Secretary of State (Webster's Wks., vol. vi. p. 256) as follows: "Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation." In *Carlisle* v. *U. S.,* 16 Wall. 147, the foregoing language was quoted with approval and applied by the federal Supreme Court in a prosecution for treason.

Moreover there is recent English authority for the proposition that a domiciled alien enemy may be made a prisoner of war and as such he is of course wholly subject to military jurisdiction. In *Rex* v. *Vine Street Police Supt.* [1916] 1 K. B. 268, it was said: "In my opinion, to show that a man is a prisoner of war it is not necessary for him to have been an actual combatant. War at the present moment is not, as it was in the olden time, confined to easily ascertained limits. The inventions and discoveries of recent years, and especially the existing means of communication, have so widened the fields of possible hostility that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put upon the exercise of acts of hostility, and real danger to the realm may therefore exist, although impossible of discovery, at distances far from where the actual clash of arms is taking place. In addition to this, methods of warfare or ancillary to warfare have come into practice on the part of our foes which involve the honeycombing the realm with enemies, not only for the purpose of obtaining and dispatching information, but for purposes directly helpful to the carrying out of enterprises either actually warlike or eminently calculated to assist the successful prosecution of war. In a contest with people who consider that the acceptance of hospitality connotes no obligation and that no blow can be foul it would, I think, be idle to expect the Executive to wait for proof of an overt act or for evidence of an evil intent." The foregoing definition of belligerency is undoubtedly broader than is sanctioned by the decision in the Milligan case, but it is eminently probable that the Supreme Court will recognize the fact that in the present conflict a Civil War definition of belligerency is as obsolete as a Civil War musket.

**Sunday Newspapers.**

THE rapid growth of this country and the radical changes in its institutions from decade to decade make the administration of law difficult, for rules and regulations appropriate to one generation become outworn by the next. Much of the prevalent feeling that the courts are unduly conservative is the inevitable outgrowth of that situation. A recent decision of the Missouri Supreme Court (*Pulitzer Pub. Co.* v. *McNichols,* 181 S. W. 1) shows a gratifying judicial recognition of the fact that the seventeenth century has closed. Confronted with the question whether the publication of a newspaper was a "work of necessity" which could lawfully be performed on Sunday the court said: "The great service the press is rendering to humanity is performed on Sunday as well as upon Monday or upon any other day of the week, and its beneficence is more potent on the former than on the latter, for the simple reason that the toiling masses have more time to read the papers on Sunday than upon any other day of the week, and therefore acquire greater knowledge and information from them regarding the matters stated on that day than upon any other day. . . . In the progress of time and the uplift of man, things which used to be useless or luxurious have become prime necessities. For instance, the railroads, the street cars, the telegraph, and the telephone. All of these have been declared public necessities, and this court, in the case of *State* v. *Railroad,* 239 Mo. 196, 143 S. W. 785, held that railroads could be compelled, under a legislative enactment, to operate trains on Sunday, and in a number of cases that telephones are public necessities. The press is a greater public necessity than all of them. In my opinion it ranks as one of the great four institutions of the country, namely, the home, the church, the public school, and the press." In the same case it was said: "Where is the court or jury in Christendom which would convict the publishers of the Post-Dispatch if indicted for publishing that paper on Sunday? This is the test." Nothing tends more to bring the law into disrepute than adherence to an archaic interpretation of a penal statute, bringing it into conflict with the general habits of the people, and

the attitude of the Missouri court is in that respect most wholesome.

### Letting George Do It.

IT is not altogether unfair to impute to every voter in a republic moral responsibility for its laws, except so far as he has distinctly endeavored to have them changed. From that assumption it is interesting and not wholly unprofitable to speculate on how far the average citizen could reconcile it with his conscience to imitate in private life some governmental practices which he accepts as a matter of course. Take for illustration the accepted system of punishing crime. Suppose Mr. Average Citizen was given plenary power over the miscreant found picking his pocket. Would he lock him up in the cellar for say ten years, spurning firmly the pleadings of his wife and children for his release? Would he watch unmoved while the wretch became pale and emaciated and his cough took on unmistakable signs of consumption? At the end of a decade would be hand him a cheap suit of clothes and a five-dollar bill and dismiss him with a pious injunction to lead an honest life? Would no uneasy qualms ever stir his conscience as he sat in the happy circle of his family or listened to the Sermon on the Mount? The thought is one with many ramifications. Tradition is strong and persistent and we preserve yet much of the attitude of mind of the citizens of a monarchy where the power and the responsibility are in the king. More just and humane laws and better enforcement of law will come with the realization that coequal with the right to liberty is the responsibility of liberty.

### The Fathers of the Republic.

THE statement has been made frequently of late that the early stages of the American Republic were attended by scenes similar to those which are now being enacted in Russia. With the perversion of history we are not concerned, but no lawyer can help resenting the resulting imputation that the makers of our Constitution were afflicted with socialism, anarchy or the kindred diseases from which weak minds suffer on a sudden transition from tyranny to liberty. Some few sporadic revolts took place of course. A few communities unable to grasp the distinction between liberty and license, resisted the payment of taxes, as in the Westmoreland County Rebellion. In one of the trials growing out of that disturbance there was a significant bit of evidence to the effect that the rioters spoke a language other than English. But the point is that these uprisings were few and involved only scattered communities. They were promptly put down and the ringleaders brought to trial. They no more threatened the solid foundations of law and order on which the government rested than do the labor riots of today. George Washington sat as firmly in his chair as does Woodrow Wilson; Chief Justice Marshall declared the law with the same authority as Chief Justice White. The interests of different sections came into conflict; variant ideals struggled for supremacy, but the questions were debated on the stump and in the halls of Congress or litigated in the courts and were settled in an orderly and constitutional manner. The founders of the government were sane and sober lawyers and statesmen. They fought to a victorious conclusion a seven years' war for independence and then formulated a constitution which provided as carefully against anarchy and lawlessness as it did against tyranny. The importance of keeping such men in the ascendancy is well demonstrated by the difference between the results of the American revolution and that of revolutions which have carried the proletariat into power for a season of bloodshed and misrule.

### Use of Militia on Foreign Soil.

THE state militia, an organization which is more or less a relic of the jealousy with which the states asserted their sovereign independence in the early days of our Republic, has played a large part in the military establishment of the past. One of the weaknesses of the system was the fact that the militia as such could be used only to "execute the laws of the Union, suppress insurrections and repel invasions." Even under the liberal interpretation given to the last clause in *Martin* v. *Mott,* 12 Wheat. 29, an army which must be held within the national boundary till the foe chooses his time and place to strike and which cannot pursue his retreating forces over an imaginary line is hardly an efficient weapon. To recall the disastrous results of that weakness is the work of the historian rather than of the lawyer. Happily their recurrence has been adequately provided against by the Act of June 3, 1916, which provides that in time of war the militia may be drafted into the federal services, losing thereby their status as militia. In this connection the public prints contained recently an unofficial opinion by a former attorney general which combines clear legal statement with vigorous Americanism. Replying to an inquiry as to a supposed former opinion militating against the power of the President to send troops to Europe, former Attorney General Wickersham is reported to have written: "Kaiser boosters must refer to my opinion of February 17, 1912, Opinions A. G., Volume 22, Page 332, to effect that Constitution limits use of militia to purposes defined in Paragraph 15, Section 8, Article 1, and that, therefore, President Wilson was without authority to send organized militia of states into foreign country as part army of occupation. To avoid this objection, National Defense Act of June 3, 1916, Section 111, provided for war drafting any or all members of national guard into service of United States, thus leaving President free to send them where he wishes. Damn the Kaiser." There is a well-known legend of a "swear word" which the recording angel blotted out with a pitying tear as he wrote it. The foregoing one he will undoubtedly record indelibly to the everlasting credit of the patriotic citizen who found himself misquoted to serve the ends of a traitorous propaganda.

### Prevention of Mob Violence.

RECENT events have again brought sharply to the public mind the inadequacy or unwillingness of the average municipality to cope with the problem of mob violence. Not only is the "lynching" of a single individual of itself an outrage on the law, but experience shows that a mob once gathered will frequently transcend the provocation under which it assembled, and a general assault on a race or a class results, with consequent injury to many innocent persons. The prevention or punishment of such crimes is rendered exceedingly difficult by the fact that it rests in the hands of officers who look to the local vote for their con-

tinuance in office and on juries which include friends or even relatives of some members of the mob. So pronounced is the difficulty that some reputable writers have recently advocated the extreme measure of "municipal abdication," i.e. the suspension of the governmental functions of a municipality which shows itself unable to protect life and property within its limits. Like most drastic remedies this is so susceptible of abuse as to be justifiable only by necessity. The plan adopted in some jurisdictions of making municipalities civilly liable for damage by mob violence has at least the advantage of affording compensation to innocent victims, though in strict logic it is hard to see why, if admitted as a principle, it should not be extended to the victim of the footpad or burglar. As a preventative measure, it doubtless has some efficiency in giving to the taxpayers a personal motive to prevent mob violence. A legislative provision for a change of venue at the instance of the prosecution would probably help to secure convictions of the rioters in many cases. It is eminently probable that the United States will never again be without an adequate military establishment, and knowledge of the presence of federal troops in the vicinity will act as a wholesome deterrent on persons disposed to riotous outbreak.

**Regulation of Air Craft.**

THE close of the present war will undoubtedly see a great increase in the use of air craft for purposes of pleasure if not of commerce. In the vicinity of government training stations aeroplanes have already become almost commonplace to the inhabitants. The next step inevitably will be the presentation to courts and legislatures of the questions arising from the new mode of travel. Regulations on the subject are common in Europe, and at least two American states have statutes dealing with it. (Conn. Pub. Acts 1911, c. 86; Mass. Acts 1913, c. 663). Judging from the early days of the automobile, the initial regulations in most communities are apt to be dictated by a good deal of ill-considered hostility. An ordinance of a New Jersey village for instance prohibits the landing of air craft in the town or the dropping of objects from air machines. The latter phase of the ordinance is commended to the attention of the municipal authorities of the "Fortress of London." But there is precedent for the ordinance from an unexpected quarter, a statute in Germany prohibiting aviators from flying over villages, towns or other places of dense population (See 18 Case & Comment 135). The problem is a difficult one; aerial navigation must not be fettered unduly, yet the rural citizen is not to be blamed for objecting to being compelled to pursue his way to church amid a hail of oil cans and Stillson wrenches dropped by aerial joy riders. And not the least of the difficulty lies in the enforcement of regulations after they are made. The only practicable plan seems to be to put the air on the same basis as the high seas, subject to federal regulation.

**When the Engagement is Broken.**

AN interesting question which delicacy of sentiment usually keeps out of court is the right of a man after a refusal of marriage to a return of the presents given during the courtship. The leading case is *Robinson* v. *Cummings*, 2 Atk. (Eng.) 409, wherein Lord Chancellor Hardwicke said: "I think, in cases of this nature, these rules may be laid down: That if a person has made his addresses to a lady for some time, upon a view of marriage, and, upon a reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him; but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favor, I look upon such person only in the light of an adventurer, especially where there is a disproportion between the lady's fortune and his, and therefore, like all other adventurers, if he will run risks, and loses by the attempt, he must take it for his pains; the defendant's case, upon all the circumstances, being a good deal of this sort." A return of presents has been decreed in several cases, following the rule thus laid down. See *Young* v. *Burrell*, Cary (Eng.) 77; *Williamson* v. *Johnson*, 62 Vt. 378. Compare *Richmond* v. *Nye*, 126 Mich. 602. In a recent case in England the swain after being jilted sought to recover the ring which he had placed on the finger of the fair one to seal the engagement. Sir Montague Shearman, after quoting the language of the Lord Chancellor in *Robinson* v. *Cummings*, went on to declare from the bench that long before the time of Moses, Abraham is stated in Genesis to have presented rings when Rebekah was betrothed to Isaac, and that there was no doubt in his mind that the story represented the ring in those days as a sign or symbol of an agreement to carry out a bargain of sale of the woman. When one came to civilized law, the woman ceased to be a chattel, and one found in Justinian the ring used as an arrabo, or a pledge, in the contract to marry, or spousalia. This even found its way into early English law. Though the origin of the engagement ring has been forgotten in these modern times, yet it still retains its character of a pledge or something to bind the bargain or contract to marry, and is given on the understanding that the person who breaks the contract must return it. "Whether the gift was a pledge or a conditional gift," concluded the court, "the result is the same."

Between the possibility of the ring being torn from her finger by the creditors of her affianced (see *Pollock* v. *Simon*, 205 Fed. 1005) and the necessity of returning it in case she changes her mind, a girl's tenure in her engagement ring is becoming very slight.

**Internment of Citizens.**

THE internment of alien enemies is a well-recognized war measure, which has already been resorted to in this country. The English defense of the realm act contains a further provision for the internment of citizens of "enemy origin or associations" and the regulations providing for such internment have been sustained recently by the House of Lords (*Rex* v. *Halliday*, [1917] A. C. 260). The policy of the act is, under the stress of war conditions, beyond question, the only question being of its validity under the American Constitutional system. Experience in the present war has shown that the agents of the enemy in the United States are not all aliens. Under normal conditions, the power of punishment for completed acts might suffice, but the present situation calls for preventative measures. A provision applicable to naturalized citizens is the more imperative because of the peculiar status of some naturalized Germans. More than one judge has heretofore consistently refused to naturalize Germans in view of the so-called Delbrueck law, one provision of which is as fol-

lows: "State nationality [that is German nationality] will be reserved for any German who, at his own request and before acquiring foreign citizenship, shall have received the written approval of the respective State authority to which he belongs, with the object of preserving his State citizenship." The effect of this law is to enable Germans to retain their German citizenship even while they become citizens of the United States, and it renders of no effect, in the cases in which the German avails himself of this permission, any renunciation of German allegiance which he may make in accepting our naturalization. In reality, as the Brazilian authority, Ruy Barbosa, has said, it makes a fiction out of any citizenship which the German may adopt.

## MILITARY JURISDICTION OVER SPIES AND SYMPATHIZERS.

DURING a national war with any first class power the Federal Constitution does not enure to the benefit of the public enemy, of spies, or of enemy sympathizers, whether native or foreign. All spies should be forthwith tried by court martial and if convicted, shot (U. S. Revised Statutes, §1343). Enemy sympathizers after conviction by court martial should be either confined at hard labor during the war or else should be deported to the enemy country as was Vallandigham.

In 1863 Vallandigham, the state leader of a great party in Ohio, publicly sympathized with the confederacy. Ohio was not at that time invaded. The courts were open. Vallandigham was tried by court martial, was convicted of sedition and sympathizing with the confederacy, and was sentenced to confinement in a fortress during the war. The Supreme Court refused to interfere (*Ex parte Vallandigham,* 1 Wall. 243, 251-4). By way of commutation of sentence he was then deported to the confederacy.

In 1904, Peabody, then Governor of Colorado, declared a county to be in a state of insurrection and ordered one Moyer to be arrested as a leader of the outbreak and detained by the national guard until he could be safely discharged and then to be delivered to the civil authorities. This was done purely as a military arrest and confinement without any civil process. It does not appear that the civil courts in the county were closed during the insurrection. After the termination of the insurrection Moyer sued the former Governor, the former adjutant general of the national guard, and the captain of the company which arrested and confined him, for an alleged wrongful imprisonment. The Supreme Court unanimously upheld the acts of the Governor and the militia. (*Moyer* v. *Peabody,* 212 U. S. 78.)

In 1901, during the Boer war, a South African was arrested by order of the military authorities, removed 300 miles from his home and confined in a civil jail by order of the military in a district in which, while martial law prevailed, the civil courts remained open. The Privy Council upheld the arrest and confinement. (*Ex parte Marais,* A. C. (1902), 109, 114-6.)

In 1902, during the Boer war, convictions of imprisonment at hard labor and fines under martial law by an administrator of martial law for acts contravening martial law regulations against sedition and unlawful travel and removal, were upheld though made by the same person who was also the civil magistrate and whose civil court was open at the time. (*Atty. Genl.* v. *Van Reenan,* A. C. (1904), 114, 118-9.)

In 1914 a New Zealand reserve officer not in actual service went to Samoa after its capture and after all German resistance had ceased, and violated war regulations by exporting gold coin from Samoa, carrying personal letters from German prisoners there to their friends interned in New Zealand and carrying photographs of captured German wireless station as well as manuscript for the editors of two New Zealand papers. He was taken back to Samoa, tried there before a military court, convicted and sentenced to five years imprisonment in New Zealand. The New Zealand Supreme Court upheld the conviction and sentence. (*Re Gaudin,* 34 New Zealand, L. R. 401.)

In 1915 a South African was arrested for violating a martial law regulation forbidding seditious language and held for trial before a special military court. The Boer rebellion in South Africa did not break out until after the alleged sedition was committed and the civil courts remained open. The Supreme Court of South Africa refused to inquire into the matter or to restrain the military court from trying all those charged with violating the martial law regulations, notwithstanding that the civil courts remained open. (*Krohn* v. *Minister for Defence,* South African L. R. (1915) Appellate Division, 191, 197-212.)

In 1914 an Australian statute authorizing the detention and confinement in military custody during the war of any naturalized person whom the Minister of Defence believed to be disaffected or disloyal without the production of any evidence whatever, was upheld on the principle of the necessity of a dictatorship during a national war. (*Lloyd* v. *Wallach,* 20 Commonwealth L. R. 299, 310-311.)

In 1818, after the Mahratta Government at Poona had been overthrown, the Peishwa (or native absolute sovereign) surrendered and his country was conquered. Lord Elphinstone, the commissioner commanding the occupied territory, seized the treasure and account books in the custody of the late treasurer of the native government. Hostilities had ceased and the civil and criminal courts of the East India Company were open. The treasurer's executors recovered judgment for what the Municipal Court of Bombay held was the private property or private treasure of the native ruler, as well as the treasurer's own property, which had been blended with the private treasure. The Privy Council held that no civil court had jurisdiction, that recourse could only be had to the Government of India for redress (*Elphinstone* v. *Bedreechund,* 1 Knapp, P. C., 316, 360-1).

The Milligan case is not in point. The only question actually there decided was the legal but not constitutional question that the statute relied upon as a basis for the military courts did not in fact give authority to establish them in the places where they were set up.

Stieber, the chief of the Prussian spies in the wars of 1866 and 1870, says in his memoirs that in the presence of von Bismarck he told an officer of the Prussian General staff that his (invisible) army of 30,000 Prussian spies was as much a Prussian "army" as the (visible and much larger) "fighting army" of von Moltke, and that von Bismarck tacitly admitted it (Lanoir, German Spy System in France, 70-72).

The militaristic feudalism which has wantonly attacked us in the course of its struggle for world power or down-

fall, justifies its attempt to conquer the world by asserting that all free governments are disintegrating; that all free peoples are either corrupt, decadent or degenerate; that treaties, international law and constitutions are all alike, nothing but scraps of paper; that feudalism with its war lords, Krupps, spies and cannon fodder is so superior to all free governments and all free people that it is above all laws, divine, international or human; also it asserts that no free government or free people have any rights which feudalism is bound to respect.

Any who assert that the Federal Constitution enures to the benefit of spies, secret agents of or sympathizers with the public enemy, must claim that the framers intended the Constitution to aid feudalism to conquer freedom. Any who assert that the spies of and sympathizers with a public enemy who desires to conquer and plunder us as Cortez did to Mexico and Pizarro did to Peru are entitled to the protection of the Constitution, must believe that the Constitution intended to limit and restrict the war power so as to deprive the nation of all means of defence.

HENRY A. FORSTER.

New York.

## HUMAN NATURE AND THE LAW.

VACATION is still upon the legal profession but its radiant days will soon be o'er. The languor on the atmosphere that woos the heart and inspires rebellion against the jealous mistress law, the monotony on the air, which like the hum of bees fixes and holds sensorial consciousness, compelling the will to abandon control and yield itself to the sensuous, dreamy influence, will give place to the mellow days of autumn and the waking realities of the work-a-day world. Yet a little sleep, a little slumber, a little folding of the hands to sleep and Castles Joyous and nymph enchanted groves will be abandoned. The lawyer having drunk deep of vacation's Amrita Cup—the wine of rejuvenescence and health—will return to the "dem'ed old grind," and the law student, bearing aloft the beacon lit by Webster for the generations of lawyers still unborn, "There is room at the top," will enter office or law school, more impatient than the wedding guest in the Ancient Mariner and with a self-sustaining confidence that prompts him to feel, like Themistocles of old, "the trophies of Miltiades will not let me sleep."

However, until the dog-star finally has set, the lawyer—unlike Mr. Vohles in "Bleak House," who never would take a vacation—is in no mood to tackle Chaos tempered with a digest. He prefers to avoid solemn adjudications and complex problems. Nevertheless, as his thoughts inevitably turn toward the field of his coming endeavors, he may profitably, and especially so the young lawyer and law student, take inventory of his equipment, and if he will do so critically and honestly, he may be forced to the conclusion that of all the branches of knowledge within his range and subject to his command, he hitherto has neglected or entirely ignored that most important to his success—a knowledge of human nature.

We are a long way from the ideal of legal education. The student, if in an office, is set down to Blackstone, Kent, Story, Greenleaf, Parsons or equivalent authors, and he pores over the works of the wise men and the great jurists of the common law and equity. If he enjoys the privileges of a law school, he will follow the same general curriculum modified by the reading and study of reported decisions. He is taught to find the "case" rather than the "principle." Of the ascertainment of the peculiar and controlling facts of a case, of the power to marshal those facts with cumulative power and bring them within the principles of law which apply, he is generally taught little, and of human nature, which is both a philosophy and a science, and which he will be obliged to practice with what success he may, he is taught nothing at all. And so he pursues

> "The lawless science of our law,
> The codeless myriad of precedent,
> That wilderness of single instances
> Through which a few by wit or fortune led
> May beat a pathway out to wealth and fame."

Parenthetically we can but wonder what poetic coloring Tennyson's muse would have given to a picture of forty-eight state courts of last resort and no supreme tribunal to harmonize conflicting decisions except the comparatively small number of cases involving federal law.

The lawyer about to begin the practice of his profession, however profound his knowledge of the law, however generous his academic culture, is but poorly prepared if he is ignorant of human life. Education is negative. There is a fallacy abroad that he who knows many things is well educated. The mind must be greater than its knowledge. If a man is "educated" above his intellect, he is as sounding brass and a tinkling cymbal. Dr. Shaler in his Autobiography says: "I have known many an ignorant sailor or backwoodsman who, because he had been brought into sympathetic contact with the primitive qualities of his kind, was a better educated man than those who pride themselves on their culture." And Schiller, with the sublime insight of a seer, says through Max in his protest to the warrior Octavio:

> "But in the field,
> Aye there the *present being* makes itself felt.
> The personal must command, the actual eye
> Examine. If to be the chieftain asks
> All that is great in nature, let it be
> Likewise his privilege to move and act
> In all the correspondences of greatness.
> The oracle within him, that which *lives*,
> He must invoke and question—not dead books,
> Nor ordinances, nor mould-rotted papers."

What is human nature? Why is a knowledge of it indispensable to the lawyer? How may such knowledge, in a measure, be acquired?

Human nature is the phenomena of feeling, emotion and instinct, which, in infinite combinations, make up the individual temperaments which control in the relations of life. "There is magic in the web of it." It is the most fascinating element in life, kaleidoscopic, variable, abounding in lights and shadows, in inconsistencies and dramatic climaxes. It is the basis of all institutions, the foundation of all government. It is the source of the poet's, the dramatist's, the novelist's inspiration. History and biography emblazon its achievements, fiction and drama lay bare its mysteries and the courts proclaim its vices and its virtues.

And what knowledge can be of more worth to the lawyer? The writer recalls a lawyer who for years, term in and term out, has been the trial counsel in nearly every case of importance in four counties of his state. Appraised by his brethren of the bar as a "fair" lawyer, devoid of liberal culture and with a vocabulary painfully limited, he nevertheless is invariably successful in winning verdicts. Once asked by the writer to what he attributed his success, he sententiously replied, "I study men, not books." He has acquired a marvelous knowledge of the human heart, and knows, as if by instinct, the particular motive that will influence a man. Success in advocacy depends of

course upon many things, but the lawyer who understands the operation of the human mind, who knows how to touch the sensibilities, how to read the character of others and with that knowledge how to influence them, has the battle more than half won. Consider the average jury, twelve men fundamentally alike, yet how illimitable the variety of intellect and feeling that must be influenced—ignorance, superstition, education, bigotry, cupidity, liberality, narrow-mindedness, class hatred, social and economical prejudices, all perhaps cunningly dissimulated. It is the lawyer's province to reach everyone of them and each one in a different way. If he cannot readily discern these varying qualities of human nature, one fatal expression, one false move, may involve his cause in disaster. On the other hand if he understands men, knows how to deal with them face to face and heart to heart, he may mould them as the potter does his clay.

What lawyer at some time in his experience has not been led into direful consequences by his own client through a failure or inability to read the subtle play of motive, to sense concealment or detect false coloring?

Consider further the infinite variety of human nature displayed on the witness stand in a single trial. The too willing or too reluctant witness, the prejudiced witness, the wilful perjurer, the constitutional liar, the witness nervous and timid, or perchance recalcitrant and obdurate. What lawyer endeavoring to elicit truth has not at some time or another been confounded by his inability to expose the motives behind these various manifestations of mind and temperament.

"Artifices" of counsel find their success in these mysteries of human nature. Readers of an earlier generation (in New York state) may recall the distinguished counsel called into desperate cases merely because of his face which could express every variety and shade of emotion with surpassing power. When William A. Beach, a great advocate and consummate cross-examiner, found a witness too deep for even his marvelous knowledge of human nature, he took no chances, but dismissed him with a contemptuous "I have no questions for *you*, sir." The late Irving Browne in one of his delightful lectures used to relate an amusing instance which came under his own observation. The witness, a retired "entire sanctification and holiness" exhorter, testifying in "the nasal twang heard at conventicle," with upraised eyes and clasped hands was sanctimoniously rehearsing his narrative to the jury as if they were twelve unregenerate sinners. The opposing counsel grasped the situation instantly and in the proper places gave wailing groans, ejaculating *sotto voce* "amen, brother!" and when the witness concluded, with a penitent air waived the privilege of asking blasphemous questions. The artifice was effective and completely broke up the case. These are instances of the great art, where the lawyer, keen in his knowledge of human nature, meets and overcomes the witness on his own ground.

How may this knowledge be acquired?

Four hundred years ago a great lawyer arose, overthrew the Aristotelian method of reasoning down from general principles syllogistically and pointing to nature, established the truth that man knows nothing except what he derives by experience on the order of her phenomena, and that all knowledge must be acquired by observation. Now mental phenomena are capable of observation and classification and the careful induction of general truths and principles from observed facts forms the basis of a method if not of a science.

First it will be observed that fundamentally all men are alike. Whately in his notes on Bacon's Essay on Nature in Man says, "Human nature is always and everywhere in most important points substantially the same." Bowden beautifully expresses the same truth, "Through what is most personal in us we come upon the common soul; let any man record faithfully his most private experiences in any of the great affairs of life and his words awaken in other souls innumerable echoes. The deepest community is found not in institutions or corporations or churches but in the secrets of the solitary heart." This is a truth. The substantial unity of history proves it. The literature of all peoples affirms it, for only such literature lives as reflects the universal elements of emotion. Poems, tales, proverbs and fables, framed in the literature of whatever tongue, centuries old yet never growing older, pass from nation to nation, through channels devious and unknown, become fixed in memory and delight the imagination of the civilized world. Tragedy and Comedy have neither latitude nor longitude, and music, the language of the human heart, is a universal tongue. Shakespeare said that only he "who holds the mirror up to nature" can touch the heart, and again "one touch of nature makes the whole world kin," something impossible if human nature were not always and everywhere the same.

This truth being established it follows that the first essential is self-observation, inner perception, introspection. The sages of ancient Greece regarded self-knowledge the most important and inscribed in letters of gold upon the Temple of Delphos the maxim *"Know Thyself."* That then which one needs to know is the deep underlying traits and trend of his own character, knowing which he will understand the strength and weakness of his own nature. Man is a microcosm and knowing himself he knows the world.

Next in importance perhaps are the great writers of philosophic insight who have explored the human soul and penetrated the innermost recesses of the human heart. Sophocles of antiquity, Ibsen of modern days, but above all Shakespeare, the dramatic poet of the world, whose plummet sounded every depth of human thought, feeling and emotion and whose genius expressed every phase of human character with absolute fidelity to nature. Do we not find his personages all about us? Who that has lived and observed has not met the individual of ingenuous intentions and open candor, apparently with no selfish aim in view, who yet by indirect and circuitous modes of action resorts to every method that ingenious cunning can devise to gain some selfish end. All things to all men, flattering himself that his actions are unnoticed, his methods unperceived and his designs inscrutable. Mystifying with strategy and deceiving with finesse. Reserved and equivocal, never explicit and never direct. We could discover and unmask him at once if we but *knew* Iago or Richard the Third, who said of himself:

> "Why, I can smile and murder while I smile,
> And cry content to that which grieves my heart;
> And wet my cheeks with artificial tears,
> And frame my face to all occasions."

As the brain is the organ of the mind so the face mirrors its outward expression. The student of human nature therefore will not ignore phreno-physics. There is play of motive in a side-long glance of the eye and deep subtlety behind the half-closed lid when united with stealthy movement and velvet voice. Temperamental signs abound and there are indications of character in the form and proportion of the head. A lawyer might accept readily a talesman whose head indicated a fine development of the perceptive organs, but if his prospective juror had a Calibanistic forehead with low ears planted at an angle of fifteen degrees to his eyebrows, he would most likely wave him aside with a "depart, thou cursed."

Mental philosophy—the study of the sensibilities, of the simple

and rational emotions, of the benevolent and malevolent affections and of the desires arising from the physical constitution—is a fundamental essential and metaphysics in its broader scope, especially so for this purpose an author like Bain, who founded mental philosophy on physiology. And in this connection Professor Wigmore's "The Principles of Judicial Proof as Given by Psychology and General Experience" is of inestimable value.

The oracle pronounced Socrates the wisest of all men "because he judiciously made choice of human nature for the object of his thoughts." Addison said: "Human nature I always thought the most useful object of human reason." Pope said: "The property study of mankind is man." Man is not an enigmatic Sphinx—not forgetting that "man" embraces woman. He is rather an open book and if in the mind's eye there are the general outlines of his character and mental tendencies, his actions, and their motives, may be read and known.

OTTO ERICKSON.

## LIABILITY OF HOUSEHOLDERS FOR INJURIES TO INVITEES

AN interesting case was recently before Mr. Justice Bailhache, raising questions which might readily arise at any time, touching the liability of any one of us for damage caused to some person coming to our house who suffers some injury through the state of our premises. The case deals with the position of the householder where a tradesman or other person, lawfully upon the premises with the permission of the householder, meets with some unexpected accident through some unknown defect in the state of the premises. It is the sort of a question which might face a householder at any moment. There are a number of authorities which deal with the point, and we propose in this article to examine the position in the light of these authorities, and incidentally to point out the significance of the recent case to which we have referred.

In the first place, we find that there is a duty owed by those in possession of the premises to those who come lawfully on to the premises. This duty can hardly be said to be thrown on the occupier of premises by the general law of negligence. It is hard, no doubt, to find the true basis of the ground. The case which we are discussing must be distinguished from the case of a person erecting a building for profit and inviting persons to make use of the building in consideration of the payment of money. The case of *Francis* v. *Cockrell* (23 L. T. Rep. 466; L. Rep. 5 Q. B. 501) stands half-way between the two. There the committee of certain steeplechases, held yearly at Cheltenham, caused a stand to be erected to enable people to view the races. The stand had been so erected yearly for some past years. But on this occasion the stand collapsed and injured the plaintiff, who brought an action against one of the persons interested in getting up the races, and who had on behalf of himself and others employed a good firm of contractors to carry out the erection of the stand. Except, apparently, that the moneys received from those making use of the stand and from letting the refreshment room in the stand building were paid into the race fund for the general benefit of the races, the defendant had no pecuniary interest in the money received from the stand. The court, however, held that the plaintiff could maintain an action.

In the last-mentioned case the court clearly felt some difficulty in defining the precise ground on which the action could be maintained. Chief Baron Kelly, although stating that there was clearly no express contract between the parties, took the view that there was an implied contract. He held that it was immaterial for what purpose the money was paid, and considered it sufficient that the defendant, having possessed himself of the stand, impliedly promised that the defendant, having paid his entrance money, should have a seat on the stand during the steeplechase. His Lordship held that the general proposition of law that where a man engages to supply another with a particular thing for a pecuniary consideration, he impliedly contracts that the thing is fit for the purpose, applied to the case before the court, subject only to this qualification, that he did not contract against defects in the thing not only not known to the person contracting, but undiscoverable by the exercise of reasonable skill and diligence or by any ordinary and reasonable means of inquiry and examination. The judgment of Baron Martin was much to the same effect. Baron Channell, however, remarked that had the defendant built the stand for his own profit the case would have been quite clear. On the authorities his Lordship thought that the fact that he got no individual benefit from the money made no difference. Mr. Justice Montague Smith considered that a contract of this kind threw a duty on the defendant, and that the defendant had in effect promised that due care and skill had been used in the construction of the stand. But his Lordship thought that the obligation could be put in another way—namely, that there was an implied promise that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so. Negligence having been found on the part of those who had constructed the stand, his Lordship was of opinion that the defendant was liable for that negligence.

We have taken the case of *Francis* v. *Cockrell* (*sup.*) as our commencing point, for it illustrates the difficulty of arriving at the true ground for saddling the responsibility for an accident to a person making use of another's premises with the permission of that other person. In that case it was regarded as founded on contract. Now let us see if this is the true ground where there is no consideration passing. In an Irish case—*Sullivan* v. *Waters* (14 Ir. C. L. R. 460)—Lord Chief Baron Pigot, who fully examined the law as it then stood, expressed himself unable to ascertain and lay down any satisfactory general rule. But in an earlier case—*Quarman* v. *Burnett* (6 M. & W. 499)—Baron Parke in delivering the judgment of the court observed that the rule of law might be that where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and his Lordship observed that such injuries are nuisances.

We now come to the most important case of all—*Indermaur* v. *Dames* (14 L. T. Rep. 484; L. Rep. 1 C. P. 274)—where the law was carefully considered. The facts in that case may be briefly stated as follows: The premises of the defendant, who was a sugar refiner, consisted of a building adapted to the ordinary uses of the trade. Incidentally there was a chute or hole in the floors of the building through which sugar was lowered or raised as occasion required. When not in use, the hole served as a means of ventilation. Apparently the light on the premises was necessarily subdued. The plaintiff was a journeyman fitter employed by a patentee who had fixed a patent gas regulator upon the premises. Part of the contract between the patentee and the defendant involved the testing of the gas jets in the building, and it was in the course of this work that the plaintiff fell through the hole and was injured. The court found that there was evidence of neglect on the part of the defendant and, in effect, that the defendant had not taken reasonable care to prevent an accident of the kind, and in such circumstances, arising.

The main point brought out by the court in the last-mentioned

case was the distinction between the rights of a mere licensee upon another's premises and the rights of a person who is in effect on the premises in the course of business. This distinction had from time to time been drawn in previous cases. Thus Baron Alderson in the case of *Southcote* v. *Stanley* (1856, 1 H. & N. 247) laid it down in the course of the argument that there is a distinction between persons who come on business and those who come on invitation. While Baron Bramwell in the course of his judgment said that if a person asked a visitor to stop at his house and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, the latter could maintain no action. Again, in the case of *Chapman* v. *Rothwell* (1858, E. B. & E. 168) Mr. Justice Erle remarked that there was a distinction between a visitor who must take care of himself and a customer who as one of the public is invited for the purpose of business carried on by the defendant.

In *Indermaur* v. *Dames* (*sup.*) Mr. Justice Willes in delivering the judgment of the Court of Common Pleas dealt with the position of a person who resorts to the premises in course of business. His Lordship said that a customer was only one of a general class of persons coming to premises by the invitation express or implied of the occupier. The learned judge laid it down that members of this class are entitled to protection from danger, and are entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know, such as a trapdoor left open, unfenced, or unlighted. Taking the instance of a customer at a shop, his Lordship said: "This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns him; and if a customer were, after buying goods, to go back to the shop in order to complain of their quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit."

The judgment in the last-mentioned case is important in that it in the first place distinguished the two classes of persons coming to the premises, in the second place defined more clearly than heretofore the exact class of person entitled to what we may call the higher degree of protection, and in the third place defined the nature or degree of protection. As to the first point, the distinction was drawn in the judgment of the court between mere visitors or volunteers resorting to the premises on the one hand, and on the other hand persons who go, not as mere volunteers or licensees or guests, but who go upon business which concerns the occupier, and upon his invitation express or implied. As to the second point, the persons who are entitled to the higher degree of protection sufficiently appear from the distinction so drawn. As to the third point, the court considered it settled law that a person, going to the premises upon the invitation express or implied of the occupier, if using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.

The case of the owner of premises let as flats who fails to keep the common staircase in a proper state of repair and free from danger, and who may thereby become liable to persons using the staircase at the invitation express or implied of a tenant, may be here mentioned. But it appears to us that although cases of this kind are often cited in support of the general doctrine laid down in *Indermaur* v. *Dames* (*sup.*), these cases very readily obscure the true nature of the doctrine, for the fact of letting premises with a common staircase raises a different relationship in point of law. However, the case of *Miller* v. *Hancock* (69 L. T. Rep. 214; (1893) 2 Q. B. 177) may be cited here. In that case the court held that there was an implied obligation upon the owner of the premises to keep the staircase in repair, and that the ordinary rule of easement law that he who owns the easement must do the necessary repairs for the enjoyment of the easement did not apply.

There is one type of case which, although connected with the duties of occupiers of premises towards other persons, we do not intend to deal with. This is the case of injury to passers-by, who, through some defect of the premises, are injured, not as invitees, but as mere members of the public using the highway adjoining the premises. Although these highway cases stand on a peculiar footing, we may mention here the case of *Tarry* v. *Ashton* (34 L. T. Rep. 97; 1 Q. B. Div. 314). The facts in that case may be briefly stated as follows: The defendant occupied a house from the front of which a large lamp hung over the highway. The lamp fell on the plaintiff and injured her while making use of the highway. The lamp was out of repair through decay, but this was not, as the jury found, known to the defendant. The fall was caused by the fall of the man who was working at the lamp. His ladder slipped owing to the wet and windy weather, and to save himself he clung to the lamp. The fastening of the lamp to the premises was, on examination after the accident, found to be in a decayed state. This man was employed by the defendant for the purpose of blowing water out of the gas pipes. The court held that the defendant was liable.

In the recent case of *Pritchard* v. *Peto* (1917) 2 K. B. 173, which is the case we referred to in the opening lines of this article, the plaintiff was an "invitee." He was on the doorstep of the premises, and when there a piece of the cornice from the top of the house fell on him, injuring him. It was admitted by him that the house was in apparently good repair, and that the defendant, the occupier, did not know of the defect in the cornice. The defect was an old one due to the action of the weather upon the cement. The learned judge—Mr. Justice Bailhache—held that the defendant owed the same duty to the plaintiff as was owed to the plaintiff in *Indermaur* v. *Dames* (*sup.*), which was quite a different duty to that owed by the defendant to the plaintiff in *Tarry* v. *Ashton* (*sup.*). But his Lordship pointed out that it was necessary to show that the defendant was or ought to have been aware of the decay of the cornice, whereas it was admitted that she was ignorant of it, and it was not shown that the fact of her ignorance was due to neglect of some reasonable precaution. In the circumstances the plaintiff failed in the action.

In these days, when it is hard to get repairs, even of the most urgent kind, effected, householders can but feel some anxiety about the state of their premises, and, in particular, whether that state of disrepair will not lead to some accident to those upon their premises as "invitees." In the recent case, however, to which we have just referred the latent defect does not appear to have been in any way due to the war. How far war circumstances would be an element in deciding the question of negligence in such cases has yet to be determined.—*Law Times.*

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"It is a clear maxim of national law that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either; if he become auxiliary to the enterprises or acts of either, he forfeits his neutral character." Story, J., The Nereide, 9 Cranch 438.

## THE RIGHT OF TESTAMENTARY DEVISE.

By RICHARD KING, Solicitor of the Supreme Court (England), London and The Hague, in *International Law Notes.*

I had intended in this short note to examine into the history of the right of testamentary devise (I use this expression for brevity in relation to personal as well as to real property), and to deal with the subject from a point of view of comparative law; but, except in a very superficial way, I do not propose to do this, but to restrict myself to calling attention to the law on the subject which obtains according to the English law, and in this connection to put forward for consideration proposals for an alteration of such law. I thus restrict myself for the reason that, so far as the history of the law of testamentary devise is capable of investigation, such investigation has been adequately made in England, Germany, France, and Belgium by eminent legists. So far as England is concerned, the subject has been exhaustively treated by Sir Henry Sumner Maine in his work entitled "Ancient Law"; and in Germany the subject has been treated with that erudition and that microscopical exactness which distinguish all scientific investigation in that country.

Leaving out of consideration the Hindoo Law, it may be broadly stated with correctness that the fountain-head of the testamentary right of devise as we now know it is that law which, in different forms, from the time of the twelve Tables down to the Justinian Code, was evolved by the race which built up the last great world Empire.

How it came about, and why it came about, that mankind claimed and exercised the right to deal with property after death has been ably dealt with and speculated upon by the eminent English and Continental legists who have treated the subject.

As a matter of fact, the actual origin of this right and its exercise is probably lost in the mists of ages; but it may be somewhat crudely stated that probably the right to devise was more or less coterminus with the existence of property such as we know it—of course, even in the stone ages mankind had property in the sense of possessing rude implements as means of preserving life, but such property would not be of the character which would bring about either the desire to deal with it, or the practicability of it being dealt with, by testamentary devise.

I may, before closing these preliminary observations, add that, when first approaching the subject, I thought that the claim of a right to devise might be entirely explained as being a necessary corollary of a belief in a future life and survival, and the consequent perpetuation of an interest in mundane affairs; but the investigations of the eminent legists I have referred to clearly show that the subject is not capable of being *entirely* explained in this way.

Proceeding to deal with the subject from the practical point of view, it may be stated that in nearly every country in the civilised world, except England and those countries under the English law, the right of testamentary devise is a limited one, "La quotité disponible" slightly varying in different countries.

According to English law, however, the testator, subject, of course, to any restriction that may have been placed upon his property, real or personal, by means of settlements made by himself or others, has the absolute disposition of his property and can, if he likes, devise his whole estate away from his family and give it to a stranger or charity.

Mr. Stroud, the eminent author of Stroud's Judicial Dictionary, in the opening remarks to an article by him on the subject of wills in the "Encyclopædia of the Laws of England," says: "English people have been so long accustomed to do what they like with their own—even after death—that it may seem strange to some to say that the power of making a will at all is not a natural right. It is a social function. In England the story of the rise and progress of that power has, characteristically, features not quite, if at all, scientific, but it is one which may be told with brevity."

Although from the time of the Norman Conquest until the passing of the Statute of Wills in 1540 Englishmen had, speaking generally, no testamentary power over land, yet the power of making a will of personal property appears to have existed and continued from the earliest period of the English law. This power, it would seem, did not extend to the whole of a man's personal estate, for by common law as it stood in the reign of Henry II. (1154) a man's goods were to be divided into three equal parts, one of which went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children, and so, *e converso,* if he had no children the wife was entitled to one moiety and he might bequeath the other; but if he died without either wife or issue the whole was at his own disposal, the shares of the wife and children being called "reasonable parts."

There has, however, been a controversy as to whether this was the general law of the land or only such as obtained in particular places by custom; the law, however, whether general or prevailing in particular places only by custom, was altered by imperceptible degrees and by a succession of statutes. The old common law was abolished so that a man might bequeath the whole of his chattels.

It may be hazarded as a speculation that this unrestricted right of testamentary devise was to a great extent brought about by the influence of the Catholic Church, which, not being imbued with that respect for the "family" which was so potent with the Romans in pre-Christian times, sought by means of the right of testamentary devise to enrich the Church and thus extend the administration of general charity. Be that as it may, the fact is that this general right of testamentary devise exists according to English law.

The question of whether the "reserve and quotité disponible" which is prescribed by the laws on the subject of testamentary devise obtaining in Continental countries should be increased or decreased has of recent years been the subject of consideration by eminent Continental lawyers, and notably the subject was discussed in the discourse which was pronounced by M. Gendebien, Avocat Général près la Cour d'Appel of Brussels, on the occasion of the opening of the Courts in 1905.

So far, however, as I am aware, there has been no serious suggestion in recent times put forward for the abolition of the restrictions on the right of testamentary devise, and I do not propose in this note to express any views with reference to the question of whether or not any alteration in existing codes are or are not desirable, restricting myself, so far as reform is concerned, to the subject of the English law. It appears to me that the only explanation of how it has come to pass that the unrestricted right of testamentary disposition has continued to exist in England and English-speaking countries is that testators have, in the majority of cases, in their testamentary devises acted judicially and in the reasonable interests of families.

Whilst, however, this has been the rule, there is not the least doubt that there have been numerous cases in which wills of a most monstrous character have been made, and there is no doubt that the occurrence of such monstrous wills continues, and will continue, to exist so long as the unrestricted right exists.

In my own professional experience I have known many wills made by testators which could only be described as iniquitous, and I have not the least doubt that if my professional colleagues were to relate their experiences they would prove that the existence of such wills is far from rare. The most frequent form of the abuse of the right of testamentary devise occurs, according to my views, in cases where the testator, being actuated either by caprice or malice towards his family, or from a desire to achieve posthumous credit for charity, seeks either to gratify his caprice or malice or, at the expense of his family, to achieve a reputation for charitableness and obtain eulogies.

That an owner of property should be at liberty during his lifetime to, at the expense, or rather to the prejudice, of his family, make unrestricted gifts to charities is a right which possibly should exist; but that he should be at liberty to do so by will appears to me to be absolutely indefensible.

If the owner of property really is of a charitable disposition, why should he not, at his own expense, make his benefactions during his lifetime, instead of during his lifetime reaping all the advantages of his wealth and exercising his so-called charitable instinct at the expense of his family?

I may, as illustrating the force of my remarks, refer to an actual case which came to my knowledge but a little time ago. A testator having a wife and child was during his life supposed to be a man of comparatively small means. His son went to the Colonies to earn his living, and the wife lived with her husband for many years in the most modest way, acting for many years during which his health was bad as a nurse. This testator made a will dealing, it was found, with a large estate, amounting to about £30,000, in which he left his wife a small annuity of about £200 and his son also a small annuity, and the whole residue of his estate to be divided amongst various charities.

Another, to my mind, iniquitous case has only recently been the subject of litigation, being a case in which a testatrix possessed of about £10,000 devised such estate away from her family, and divided such estate between two politicians for the purpose of their propaganda.

I sincerely hope that in the near future the whole subject may be taken into consideration in England and that the English law may be brought into harmony with the laws that obtain on the Continent of Europe and elsewhere, which to my mind are so obviously equitable and just, as preserving a reasonable right of testamentary disposition whilst at the same time safeguarding the interests of the family.

## Cases of Interest

AUTHORITY OF SUPERINTENDENT OF SCHOOLS TO CHASTISE PUPIL.—The authority of a teacher in a public school to chastise an unruly pupil is well established, but in Prendergast *v.* Masterson, (Tex. Civ. App.) 196 S. W. 246, it was held that a superintendent of a school district has no such authority, because he is not a "teacher" within the meaning of the rule. The court says: "The teacher the law has in mind, we think, is one who for the time being is in loco parentis to the pupil; who, by reason of his frequent and close association with the pupil, has an opportunity to know about the traits which distinguish him from other pupils; and who, therefore, can reasonably be expected more intelligently to judge the pupil's conduct than he otherwise could, and more justly measure the punishment he deserves, if any."

LIABILITY OF COUNTY FOR FEES OF ALIENISTS EMPLOYED TO EXAMINE PERSON ACCUSED OF MURDER.—In State *v.* Weeks, (N. H.) 101 Atl. 35, the question involved the liability of a county for fees of alienists employed by counsel of the defendant to examine their client who had been indicted for murder. The claim for fees was disallowed. Peaslee, J., for the court said: "The case appears to be one of new impression. No precedent has been found for the course here urged in behalf of the defendant. The proposition is that the public shall pay the expenses incurred by the defendant outside of court in the preparation of his defense. Of course there can be no common-law authority for such an order. By that law the defendant 'was denied compulsory process for his witness, and when they voluntarily appeared in his behalf, he was not permitted to examine them on oath, nor to have the aid of counsel in his defense, except only as regarded the questions of law.' United States *v.* Reid, 12 How. 361, 364, 13 L. Ed. 1023. It required legislative action to give the defendant the rights he would have in a civil cause. 4 Blk. Com. 360. It is manifest that a right so acquired cannot be extended so as to include a privilege or right never known to the common law, and in no way created by any statute. The right to the state's process to compel the attendance of the defendant's witnesses in certain cases originated in this state with the act of 1829. The changes which have, from time to time, been made in the statute show a continuing legislative understanding that the power of the court to grant a person charged with crime assistance in his defense at the public expense is wholly statutory."

LIABILITY OF MUNICIPALITY FOR SLIPPERY STREET CAUSED BY OILING IT.—That a municipality may be liable in damages for the failure of its officers to exercise care in the oiling of streets is the holding of the Massachusetts Supreme Court in Kelleher *v.* City of Newburyport, 116 N. E. 807, wherein there were two actions to recover for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by a defective condition of the highway. Rugg, C. J., said: "There was evidence tending to show that the accident occurred in this way: The plaintiff, a milkman, was watering his horse at a fountain in the street between 8 and 9 o'clock of a misty morning, when an automobile carefully driven came upon the street and, by reason of the extremely slippery condition of its surface due to oiling on the preceding afternoon by those in charge of the defendant's streets, began to skid, could not be controlled, and collided with the plaintiff's milk wagon, whereby the plaintiff was injured and subsequently died. There was evidence that the defendant failed in the performance of its statutory duty to maintain the way reasonably safe for travel, and permitted to exist a defect consisting of extraordinary slipperiness in the surface of the street. Mere smoothness and slipperiness of a sidewalk may be a defect. Cromarty *v.* Boston, 127 Mass. 329, 34 Am. Rep. 381; Moynihan *v.* Holyoke, 193 Mass. 26, 78 N. E. 742. Oil spread upon the surface of the street, thus rendering it unreasonably slippery, is in no wise distinguishable, so far as concerns the legal principles involved, from the Hyatt lights in issue in these cases. Zegeer *v.* Barrett Mfg. Co., 226 Mass. 146, 115 N. E. 291."

STATUTORY LIABILITY OF OWNER OF DOG FOR INJURIES BY IT TO PERSONS OR PROPERTY AS APPLICABLE TO MAD DOG.—On the authority of a late case the rule is that a mad dog may cause injury to property or a person without imposing liability on its owner even though a statute exists making the owner liable generally for an injury to property or person. The case in question is Legault *v.* Malacker, (Wis.) 163 N. W. 476. Three judges dissent, including Marshall, J., who says: "I dissent

from the opinion of the court that the statutory liability of the owner of a dog for injuries by it to persons or property does not apply to mad dogs. The statute abrogates the common law rule and does not make any exception. It was competent to make the law cover all cases and, if its language is given full effect, it does so. In my opinion, the court should not judicially amend the statute. The better way is to take a law, when constitutional and plain, just as it is given and let the Legislature have the responsibility for the result. I think that is the logic of Legault *v.* Malacker, 156 Wis. 507, 145 N. W. 1081. It may be that, if a person, by his own wrongful conduct, causes a dog to injure him, he is not entitled to the protection of the statute; but that question is not before us. If other jurisdictions, in dealing with statutes like ours, have minimized their effect by judicially reading out of them an exception to fit such facts as we have here, I am not inclined to follow them. The experience of years has led me, more and more, to appreciate that the unambiguous words of the law making power, within constitutional limitations, should be administered according to their plain, ordinary meaning. . . . The only judicial authority which can be found, so far as I am advised, contrary to the foregoing is the opinion of two justices out of four in Elliott *v.* Herz, supra. The dissenting opinion by Chief Justice Graves seems much more logical. The statute there was different from ours in that it provided for double damages. The court did not support its views by authority. They do not seem to have been approved in any subsequent case. The reasoning in Jenkinson *v.* Coggins, 123 Mich. 7, 81 N. W. 974, rather impresses me that if the question were presented anew, the doctrine of the Elliott Case would be overruled. It is cited in some late text books with Van Etten *v.* Noyes, 128 App. Div. 406, 112 N. Y. Supp. 888, as holding that there is no liability for the acts of a dog which suddenly turns mad; but the latter case did not turn on a statutory regulation and so is not in point."

THREATS AGAINST PRESIDENT INVOLVING LIABILITY.—A recent statute by Congress enacted Feb. 14, 1917, provides as follows: "Any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding one thousand dollars or imprisonment not exceeding five years, or both." In U. S. *v.* Stickrath, 242 Fed. 151, it was held that the statute was violated by words spoken by the defendant as follows: "President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself." Speaking of the statute generally Sater, District Judge, said: "In this country sovereignty resides in the people, not in the President, who is merely their chosen representative. To threaten to kill him or to inflict upon him bodily harm stimulates opposition to national policies, however wise, even in the most critical times, incites the hostile and evilminded to take the President's life, adds to the expense of his safeguarding, is an affront to all loyal and right-thinking persons, inflames their minds, provokes resentment, disorder, and violence, is akin to treason, and is rightly denounced as a crime against the people as the sovereign power. The statute in question was enacted, not only for the protection of the President as the representative and chosen chief executive of the nation, but also to preserve the tranquillity of the people and their peace of mind. Its passage came at a time when this country was about to be driven into and to engage in an epoch-making and substantially worldwide war, participation in which it had earnestly sought to avoid. It was then known that there were some who, on account of erratic tendencies, or mistaken views, or want of sympathy with or even loyalty to our country, were unfriendly to its aims and might, by direction or indirection, or both, endeavor to embarrass and cripple it in the great struggle upon which it was about to be forced to enter, and might by threats assail the President, and thereby inspire others to attempt his life, if they themselves should not undertake the commission of that crime. The enactment was opportune, not only on account of our past record of three presidential assassinations and the peculiar stress to which the country was about to be subjected, but that there might hereafter be a deterrent to restrain the disloyal, erratic, misguided, or wickedly disposed. In so far as diligent inquiry has disclosed, the statute under consideration is as unique as it is forceful. There are laws in many of the states against threats to extort money, to gain property or some other advantage, or to compel a person to act against his will, but no enactment of a similar nature by the English Parliament, by Congress, or by the Legislature of any of the states has been found."

DISBARMENT OF ATTORNEY AS PENALTY OR FORFEITURE WITHIN MEANING OF IMMUNITY STATUTE.—The question suggested in the catchline was considered by the New York Court of Appeals, in In re Rouse, (N. Y.) 116 N. E. 783, which was an appeal by an attorney for an order of disbarment. The circumstances leading up to the disbarment were as follows: In 1912 the appellant, Jacob Rouss, was the attorney for one Eugene Fox. Fox, a member of the police force in the city of New York, had been brought before a magistrate on the charge of collecting bribes from the keeper of a disorderly house. The keeper of the house, one George A. Slipp, had been served with a subpœna, or at least there had been to his knowledge an attempt to serve him. Rouss and Slipp's attorney entered into an arrangement that Slipp for a money consideration would keep without the state. The money was paid; Slipp fulfilled his bargain; and Fox was discharged. Indictments were later found against five inspectors of police for conspiracy to obstruct justice through the suppression of Slipp's testimony. On the trial of those indictments, Rouss was a witness for the people. His testimony as there given was in substance a confession of guilt. Charges of professional misconduct were afterward preferred against him. To these charges he made answer that he was immune from discipline by force of section 584 of the Penal Law, providing that: "No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court, magistrate or referee, upon any investigation, proceeding or trial, for a violation of any of the provisions of this article [article 54, defining and punishing conspiracy], upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial." The question was whether disbarment was a penalty or forfeiture within the meaning of that statute. The answer was in the negative and the order was affirmed. Cardozo, J., said: "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally

essential afterwards. Selling *v.* Radford, 243 U. S. 46, 37 Sup. Ct. 377, 61 L. Ed. —; Matter of Durant, 80 Conn. 140, 147, 67 Atl. 497, 10 Ann. Cas. 539. Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime."

VALIDITY OF STATUTE PROHIBITING EMPLOYMENT AGENCIES FROM COLLECTING FEES FROM EMPLOYEES.—A case of real importance is that of Adams *v.* Tanner, 37 Sup. Ct. Rep. 664, which passes on the validity of a statute of the state of Washington which provides as follows: "It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto." The court divides on the question of the validity of this statute. The majority hold that it is unconstitutional, while a strong dissenting opinion by Mr. Justice Brandeis concurred in by Justices Holmes and Clarke is to the effect that the statute should be held to be valid. The dissenting opinion is in part as follows: "The statute of the state of Washington, commonly known as the 'Abolishing Employment Offices Measure,' was proposed by Initiative Petition No. 8, filed July 3, 1914, and was adopted November 3, 1914, at the general election; 162,054 votes being cast for the measure and 144,544 against it. In terms the act merely prohibits the taking of fees from those seeking employment. Plaintiffs, who are proprietors of private employment agencies in the city of Spokane, assert that this statute, if enforced, would compel them to discontinue business and would thus, in violation of the 14th Amendment, deprive them of their liberty and property without due process of law. The act leaves the plaintiffs free to collect fees from employers; and it appears that private employment offices thus restricted are still carrying on business. But even if it should prove, as plaintiffs allege, that their business could not live without collecting fees from employees, that fact would not necessarily render the act invalid. Private employment agencies are a business properly subject to police regulation and control. Brazee *v.* Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561. And this court has made it clear that a statute enacted to promote health, safety, morals, or the public welfare may be valid, although it will compel discontinuance of existing businesses in whole or in part. . . . In so far as the statute may be regarded as a step in the effort to overcome industrial maladjustment and unemployment by shifting to the employer the payment of fees, if any, the action taken may be likened to that embodied in the Washington Workmen's Compensation Law (sustained in Mountain Timber Co. *v.* Washington, 243 U. S. 219, 37 Sup. Ct. Rep. 260), whereby the financial burden of the industrial accidents is required to be borne by the employers. As was said in Holden *v.* Hardy, 169 U. S. 366, 387, 42 L. ed. 780, 789, 18 Sup. Ct. Rep. 383, 'In view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees as they arise.'"

"MANUFACTURE" IN STATUTE PROHIBITING MANUFACTURE OF WINE AS INCLUDING MAKING IN SMALL QUANTITIES FOR OWN USE.—A statute prohibiting "manufacture" of intoxicating liquor is violated by a person who makes fermented wine in small quantities for the use of himself and family. State *v.* Marastoni, (Oregon) 165 Pac. 1177, wherein the court said: "The principal question in this case is whether the defendant 'manufactured' the wine which he kept on the premises. That he pressed the juice from the grapes, put it in a vat, and permitted it to ferment by the usual natural process, with the intent to use part of it in that state as a beverage for himself and family, is admitted. We are of the opinion that the word 'manufacture,' as used in section 5 of the act referred to, means to 'make' irrespective of the quantity produced, or the use to which it is to be put. . . . It is also claimed that if section 36, art. 1, of our Constitution should be construed so as to prevent the manufacture of intoxicating wine for the maker's own use, it is violative of the Fourteenth Amendment to the national Constitution. This contention is not new, and is disposed of in Mugler *v.* Kansas, 123 U. S. 653, 8 Sup. Ct. 297, 31 L. Ed. 205, wherein Mr. Justice Harlan, speaking of the attitude of the courts toward legislation of this character, observes: 'If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot without usurping legislative functions override the will of the people, as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business to which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority, to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare. No doubt, to many of our citizens accustomed to the use of wine as a table beverage to the same extent that others have used tea or coffee or milk, such extreme legislation may seem drastic and harsh. It certainly seems so to the writer, but whatever may be our individual opinions they must yield to the mandates of the law.'"

VALIDITY OF ORDINANCE REQUIRING CUSTARD TO CONTAIN CERTAIN AMOUNT OF BUTTER FAT.—An ordinance requiring ice cream to contain at least ten per cent of butter fat, and providing that custard should for the purpose of the ordinance be deemed to be ice cream was held invalid as applied to custard

in the case of City of New Orleans *v.* Toca, (La.) 75 So. 239, wherein the court said: "We fail entirely to find wherein the public welfare can require the establishment of any such standard for custard, whether frozen or on pie crust, any more than for any other article of food; and as we are not prepared to say that a standard of nutritiousness may be set for all articles of food offered for sale, we find ourselves constrained to hold that one cannot be set for custard. In Ribgers *v.* Atlanta, 7 Ga. App. 411, 66 S. E. 991, the Court of Appeals of Georgia said of ice cream and that it 'is a luxury, rather than a necessity,' and refused to allow a butter fat standard to be set for it under the general welfare clause. But conceding that for ice cream, the use of which as an article of diet has come to be so widespread, a standard may be set, the same thing cannot be said of custard, which in its frozen state is not commonly offered for sale to the public as custard; and it is as custard, distinctly as such, that accused offers his product to the public. The eupeptic man may want his custard rich in fact, and correspondingly indigestible; the dyspeptic may want his more of the kind that Toca offers. It is not for the law to step in and say to the latter, you shall not be allowed to buy and eat the light and digestible kind, but only the fat and indigestible. The case is not that of there being nothing in a name, of a rose by any other name smelling as sweet; the question being one of deception vel non, there is everything in the name. . . . The cases in which the outlawing of oleomargarine offered for sale as such with no attempt at deception has been sanctioned stand, we must admit more or less in the way; but those decisions must be admitted to have reached the very extreme limit, and to be justifiable only on the score of the peculiar resemblance of oleomargarine, a manufactured article, to butter, a natural product and one of the main articles of human food, and on the peculiar opportunities that the sale of oleomargarine offers for deception. And also may not such a thing be as that the strong popular prejudice existing at first against this supposedly fake butter had found some unconscious lodgment in the judicial mind, and furnished the last feather in the scale?"

LIABILITY OF STATE PROTECTING BEAVER TO OWNER OF FOREST DAMAGED BY THEIR ACTS.—The liability of the state of New York to the owner of a forest in the Adirondacks for the destruction of trees by beaver protected by the state is the subject of a valuable opinion by Andrews, J., in Barret *v.* State, (N. Y.) 116 N. E. 99. The facts in the case were that the state of New York undertook to protect beaver by providing by statute in 1904 that "No person shall molest or disturb any wild beaver or the dams, houses, homes or abiding places of same." Furthermore it appropriated money to restock the Adirondacks and among the places where beaver were liberated was Eagle creek, an inlet of the Fourth Lake of the Fulton Chain. The claimants owned a valuable tract of woodland upon Fourth Lake bounded in the rear by Eagle creek. Their land was held by them for building sites and was suitable for that purpose. Much of its attractiveness depended upon the forest grown upon it. In this forest were a number of poplar trees. In 1912 and during two or three years prior thereto 198 of these poplars were felled by beaver. Others were girdled and destroyed. The Court of Claims found that this destruction was caused by beaver liberated on Eagle creek and their descendants, and that by reason thereof the claimants had been damaged in the sum of $1,900. An award was made to them for that sum, and this award was affirmed by the Appellate Division of the Supreme Court. To sustain it in the Court of Appeals the respondents relied upon three propositions: First, that the state may not protect such an animal as the beaver which is known to be destructive; second, that the provision of the law of 1904 with regard to the molestation of beaver prohibits the claimants from protecting their property, and is therefore an unreasonable exercise of the police power; and, third, that the state was in actual physical possession of the beaver placed on Eagle creek, and that its act in freeing them, knowing their natural propensity to destroy trees, makes the state liable for the damage done by them. The Court of Appeals could not agree with either of the propositions submitted by the respondents and reversed the judgment of the Appellate Division. Andrews, J., speaking for the court said in part: "The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual, and spiritual needs may also be considered. The eagle is preserved, not for its use, but for its beauty. The same thing may be said of the beaver. They are one of the most valuable of the fur-bearing animals of the state. They may be used for food. But apart from these considerations, their habits and customs, their curious instincts and intelligence, place them in a class by themselves. Observation of the animals at work or play is a source of never-failing interest and instruction. If they are to be preserved experience has taught us that protection is required. If they cause more damage than deer or moose, the degree of the mischief done by them is not so much greater or so different as to require the application of a special rule. If the preservation of the former does not unduly oppress individuals, neither does the latter. . . . We therefore reach the conclusion that in protecting beaver the legislature did not exceed its powers. Nor did it so do in prohibiting their molestation. It is possible that were the interpretation given by the respondents to this section right a different result might follow. If the claimants, finding beaver destroying their property, might not drive them away, then possibly their rights would be infringed. In Aldrich *v.* Wright, 53 N. H. 398, 16 Am. Rep. 339, it was said in an elaborate opinion, although this question we do not decide, that a farmer might shoot mink even in the closed season should he find them threatening his geese. But such an interpretation is too rigid and narrow. The claimants might have fenced their land without violation of the statute. They might have driven the beaver away, were they injuring their property. The prohibition against disturbing dams or houses built on or adjoining water courses is no greater or different exercise of power from that assumed by the legislature when it prohibits the destruction of the nests and eggs of wild birds even when the latter are found upon private property. The object is to protect the beaver. That object as we decide is within the power of the state. The destruction of dams and houses will result in driving away the beaver. The prohibition of such acts, being an apt means to the end desired, is not so unreasonable as to be beyond the legislative power. We hold therefore that the acts referred to are constitutional. But had we reached a different conclusion the respondents would not be aided. We know of no principle of law under which the state becomes liable because of the adoption of an unconstitutional statute. Such a statute is no protection to officers assuming to proceed under its authority. The state itself, if it permits such a claim to be enforced against it, may become liable for what they do. But the statute itself is void. No one need obey it. If no affirmative act is done under its supposed authority, neither the state nor its officers are liable, because the citizen chooses to obey where he need not have done so."

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"What is or what may be right depends upon many circumstances. The principle is impracticable as a rule of action to be administered by the courts." Hunt, J., Allen & Co. *v.* Ferguson, 18 Wall. 4.

# News of the Profession

THE ARKANSAS COUNTY JUDGES' ASSOCIATION met in annual convention at Lake Village, Ark., on July 19 and 20.

THE NORTH DAKOTA COUNTY JUDGES' ASSOCIATION held its annual convention at Devils Lake, N. Dak., on July 11.

DEATH OF FORMER NEVADA JUDGE.—James G. Sweeney, formerly a judge of the Supreme Court of Nevada, died at Oakland, Cal., on July 6.

APPOINTED MUNICIPAL JUDGE.—George Rossman has been appointed Municipal Judge of Portland, Oregon, to succeed John H. Stevenson, resigned.

NAMED COUNTY JUDGE.—Governor Philipp of Wisconsin has appointed Andrew F. Wright of Cumberland as county judge of Barron county, to succeed Judge C. W. Meadows, resigned.

MISSOURI JUDGE RESIGNS.—Judge Charles H. Mayer of the Missouri circuit court, division No. 2, Buchanan county, has resigned from the bench to resume private practice.

NAMED SPECIAL UNITED STATES ATTORNEY.—Earle C. Latourette of Oregon City has been appointed special United States attorney for Oregon by Attorney General Gregory.

MINNESOTA JUDGE DEAD.—John C. Nethaway of Stillwater, judge of the Minnesota district court and formerly assistant attorney general of Minnesota, died at Shakopee, Minn., on July 5, aged 67 years.

AMERICAN BAR ASSOCIATION.—A detailed report of the meeting of the American Bar Association to be held at Saratoga Springs, N. Y., on September 4, 5 and 6, will appear in LAW NOTES for October.

INDIANA JUDGE DEAD.—Judge Nicholas Cornet, of Lawrenceburg, Ind., a member of the Joint Land Commission of the Panama Canal Zone, died at Cincinnati, Ohio, on July 11, aged 64 years.

SUCCEEDS SON AS COUNTY JUDGE.—J. K. Ford, of Webb City, has been appointed county judge of Franklin county, Arkansas, to succeed his son who has entered the officers' training camp at Fort Roots.

NEW POLICE JUDGES IN KENTUCKY.—Governor Stanley of Kentucky has appointed William Gibson to be Police Judge of Evarts, and has named F. A. Miller to succeed D. P. Busroe as Police Judge of Hodgenville.

OHIO JUDICIAL APPOINTMENT.—William W. Zimmerman, of Youngstown, has been appointed judge of the court of domestic relations for Mahoning county, Ohio. The position was created at the last session of the general assembly.

APPOINTED AMBASSADOR TO JAPAN.—Roland S. Morris, a Philadelphia lawyer, graduate of Princeton and of the law school of the University of Pennsylvania, has been selected by President Wilson for the vacant ambassadorship to Japan.

LAWYER NAMED TO AID MCADOO.—T. W. Blackburn, an Omaha lawyer, has been named by Secretary of the Treasury McAdoo as a member of the committee of insurance experts to assist the treasury department in working out a plan for military insurance.

THE SOUTH CAROLINA BAR ASSOCIATION convened at Greenville, S. C., for its annual meeting, on August 3. The president's address was delivered by T. W. Bacot, of Charleston, and the annual address was given by George F. Canfield of Columbia University, New York.

NEW UNITED STATES ATTORNEYS.—Webster W. Holloway, of Kansas City, has been appointed third assistant United States attorney for Kansas.—Donald A. McDonald, of Seattle, has been appointed first assistant United States attorney for the Western District of Washington.

APPOINTED TO BENCH IN DISTRICT OF COLUMBIA.—C. J. Smyth, of Omaha, Neb., who has been acting as special counsel to the department of justice since 1913, has been appointed by President Wilson as Chief Justice of the Court of Appeals of the District of Columbia, to succeed Judge Shepard, resigned.

DISTINGUISHED OHIO JUDGE DEAD.—George F. Robinson, a distinguished lawyer, jurist and soldier, died at Ravenna, Ohio, on July 23, aged 73 years. He served throughout the Civil War, practiced law twenty years, and was common pleas judge at Youngstown, Warren and Ravenna for thirty years.

THE COMMERCIAL LAW LEAGUE OF AMERICA held its annual convention at Saratoga Springs, N. Y., on July 23-26, inclusive. The program included the president's address, by E. G. McGilton, of Omaha, on "Loyalty to League Ideals," and the annual address by Prof. Roscoe Pound, Dean of the Harvard Law School, on "Commerce and Legal Progress."

DEATH OF FORMER UNITED STATES JUDGE.—Rufus Hildreth Thayer, of Albany, N. Y., judge of the United States Court for China from 1909 to 1913 and former judge advocate-general of the District of Columbia national guard, died at Kingston, N. Y., on July 12. He was serving as chairman of the Schoharie-Shandaken Condemnation Commission.

THE MINNESOTA STATE BAR ASSOCIATION held its annual meeting at Minneapolis, Minn., on August 7, 8 and 9. Besides the address by the president, Frank Crasweller of Duluth, addresses were delivered by President Burton of the University of Minnesota, by Sir James Aikins, president of the Canadian Bar Association, and by Charles H. Hamill of Chicago.

DEATH OF PROMINENT SOUTHERN LAWYER.—Edwin J. Justice of Greensboro, N. C., special assistant to Attorney General Gregory, died suddenly on July 25 at San Francisco. He had been on the Pacific Coast for two years, prosecuting the government oil cases under the Taft withdrawal act. Mr. Justice was formerly a member of the North Carolina legislature.

MISSOURI BAR ASSOCIATION.—The thirty-fifth annual meeting of the Missouri Bar Association will be held at Kansas City, Mo., on September 27, 28 and 29. Secretary George H. Daniel, of Springfield, announces that it is the purpose of the association to carry as honorary members all attorneys who enter the military or naval service, giving their names on a roll of honor.

THE FLORIDA STATE BAR ASSOCIATION met in annual session at Atlantic Beach, Fla., on August 10 and 11. Nathan P. Bryan, of Jacksonville, delivered the president's address. Other speakers were United States Senator George E. Chamberlain of Oregon, S. M. Sparkman of Tampa, the dean of the college of law of the University of Florida, and the dean of the college of law of Stetson University.

FORMER OHIO LAWYER DIES IN CALIFORNIA.—Carl G. Jahn, aged 82, one of the organizers of the Ohio State Bar Association, died at Pasadena, Cal., on July 6. Mr. Jahn had spent the last ten years of his life in Pasadena, and before that had lived in Columbus and Cincinnati. In Columbus he was editor of the *Weekly Law Bulletin*, and in Cincinnati was for a time assistant United States district attorney.

INDIANA BAR ASSOCIATION.—The annual meeting of the Indiana Bar Association was held in Indianapolis, Ind., on July 11 and 12. William A. Hough, of Greenfield, delivered the president's address. Other addresses were delivered by Newton W. Gilbert, of New York, former vice-governor-general of the Philippine Islands, by Charles S. Cutting, of Chicago, and by Quincy A. Myers, of Indianapolis.

DEATH OF FEDERAL JUDGE.—Francis M. Wright, federal judge for the Eastern District of Illinois, died at Urbana, Ill., on July 15, aged 73 years. Judge Wright served in the Civil War and was mustered out as second lieutenant. In 1891 he was elected circuit judge of Illinois. In 1904 he was appointed by President McKinley to the United States Court of Claims at Washington, and in 1908 he was appointed federal judge by President Roosevelt.

ALABAMA BAR ASSOCIATION.—At its recent annual convention held in Birmingham, Ala., the Alabama Bar Association elected the following officers: President—Henry Upson Sims, of Birmingham; vice-presidents—R. C. Hunt, of Fort Payne; R. T. Ervin, of Mobile; W. W. Callahan, of Decatur; John W. Lapsley, of Selma; J. A. Carnley, of Elba; secretary and treasurer—Alexander Troy, of Montgomery, who was re-elected for the thirty-ninth consecutive time.

OHIO STATE BAR ASSOCIATION.—As was announced in August LAW NOTES, the thirty-eighth annual meeting of the Ohio State Bar Association was held at Cedar Point, Ohio, on July 10, 11 and 12. The president's address was delivered by Edmund B. King, of Sandusky. Samuel Rosenbaum of Philadelphia delivered the annual address, his subject being "Commercial Arbitration in England." The following officers were elected: President—John A. Schauk, of Columbus; secretary—Charles E. Blanchard, of Columbus; treasurer—C. R. Gilmore, of Dayton.

KENTUCKY BAR ASSOCIATION.—The sixteenth annual meeting of the Kentucky Bar Association was held at Dawson Springs, Ky., on July 5 and 6. W. P. Kimball of Lexington delivered the president's address and the annual address was given by Governor A. O. Stanley. Other addresses were as follows: "Tax Reform," by Reuben B. Hutchcraft, Jr., of Paris; "Some Great Lawyers of Kentucky," by George Webb, of Lexington; "Liability of Counties and Municipalities in Tort," by Leon Lewis, of Louisville; "The Constitutions and Constitutional Conventions of 1792 and 1799," by John C. Doolan, of Louisville; "The Adamson Law," by C. U. McElroy, of Bowling Green. Robert C. Simmons, of Covington, was elected president of the association for the ensuing year.

COLORADO BAR ASSOCIATION.—The annual convention of the Colorado Bar Association was held at Colorado Springs, Colo., on July 13 and 14. Thomas J. O'Donnell of Denver delivered the president's address. Other addresses were as follows: "The Phases of Our Constitutional Growth as Guarded by the Supreme Court of the United States," by Hampton L. Carson of Philadelphia, former attorney general of Pennsylvania; "Practical Operation of the Drainage District Law in Colorado," by W. W. Platt of Alamosa; "Conditional Water Decrees," by Robert G. Strong of Greeley. Officers were elected as follows: President—Thomas H. Devine of Pueblo; first vice-president—W. H. Wadley of Denver; second vice-president—Samuel H. Kinsley of Colorado Springs; secretary and treasurer—W. W. Grant of Denver.

WEST VIRGINIA BAR ASSOCIATION.—The thirty-third annual meeting of the West Virginia Bar Association was held at White Sulphur Springs, W. Va., on July 5 and 6. The annual address was delivered by Sherman L. Whipple, of Boston, his subject being "The Power of Courts to Make Law and Annul Legislation." Officers for the ensuing year were elected as follows: President—Wells Goodykoontz, of Williamson; vice-presidents—John J. Coniff of Wheeling; Tracy L. Jeffords of Harpers Ferry; Harvey F. Smith of Clarksburg; J. F. Barron of St. Marys; I. C. Herndon of Welch; W. L. Lee of Fayetteville; secretary—J. R. Morris, Jr., of Charleston; treasurer—C. E. Kreps of Parkersburg; executive council—B. M. Ambler of Parkersburg; H. C. Jones of Morgantown; Joseph M. Saunders of Bluefield; E. L. Nuckols of Fayetteville; R. S. Spilman of Charleston.

JOINT BAR MEETING.—Joint sessions of the bar associations of Oregon, Washington, Idaho and British Columbia, were held at Seattle, Wash., on July 26, 27 and 28. Addresses were delivered by Wilmon Tucker, president of the Washington association; by Judge Samuel White, president of the Oregon association; by Judge James F. Ailshie, former Chief Justice of Idaho; and by Judge Gordon Hunter, Chief Justice of the Supreme Court of British Columbia. Other speakers were as follows: Judge Dalton Biggs of Portland; James B. Howe of Seattle; Sir Charles Hibbert Tupper of Vancouver, B. C.; Professor Orrin Kipp McMurray, professor of law in the University of California; and Dr. Henry Suzallo. The Washington association elected the following officers: President—Nathan C. Richards of Yakima; secretary—C. Will Schaffer of Olympia; treasurer—Atwood A. Kirby of Spokane.

## English Notes*

TRADING WITH ALIEN ENEMY.—The complex question of what constitutes trading with an alien enemy has again been considered by the full Court of Appeal in order to determine whether a contract for the sale of land held good and did not constitute trading with the enemy. It may be taken as clear that at the present time domicil and nationality are not the tests to be applied, but alien enemies are those persons resident or carrying on business in enemy countries. In the case in question, Tingley *v.* Millier, an unnaturalized German gave an irrevocable power of attorney to sell his house, and afterwards left for Germany, which country the court presumed he reached before the contract for sale was entered into. Five judges have now held that the contract must stand, as the transaction did not involve intercourse with the enemy, the power of attorney not being revoked when the owner of the house became an alien enemy. Lord Justice Scrutton, however, took a contrary view, but if the other judges of the court are correct, a large loophole is created for permitting enemy trading through the agency of attorneys and trustees. Doubtless as a matter of policy it would be impossible to revert to the earliest rights of the prerogative, but no benefits should be allowed to enure for alien enemies by transactions of any kind carried out by them or on their behalf. As the law now stands, intercourse may be said to be more suspended than prohibited.

*With credit to English legal periodicals.

LITERARY PROCLIVITIES OF THE BAR.—The announcement that Mr. Balfour Browne, K. C., has a further volume of reminiscences coming out very shortly is again a reminder that the Bar has always had numerous representatives in the field of letters, many of whom have recognized that their chance of being remembered generally was infinitely greater by being associated with some work in literature than by distinction, however marked, in the department of law. For instance, Lord Campbell, although no doubt great as a lawyer, will have his name kept longer in remembrance by his Lives of the Lord Chancellors and his Lives of the Chief Justices than by his judicial pronouncements in the Queen's Bench and in the House of Lords. In connection with the literary proclivities of members of the Bar, it is also curious to notice the singularly antithetical works produced by some of them. Thus, Sir Henry Stewart Cunningham, whose name is on the title page of various editions of Indian legal treatises, is likewise on that of one of the most charming of biographical sketches, the Life of Lord Bowen; or, to come to some of the younger men, we have Sir Henry Newbolt, known and admired throughout the English speaking world as the poet of naval daring, who in his early days was on the staff of a now defunct series of law reports, and helped in the production of a Digest of Cases; there is Mr. R. C. Lehmann, known by his contributions to *Punch*, likewise joint author of Dale and Lehmann's Digest of Overruled Cases; and there is Mr. Walter Sichel, now a skilful historical biographer, who in his legal youth wrote jointly with Sir William Chance a work on Interrogatories and Discovery.

RETURN OF ENGAGEMENT GIFTS.—It is stated in Lord Halsbury's Laws of England (vol. 15, p. 421), on the authority of Robinson *v.* Cumming (2 Atk. 409), that "a man who has become engaged to a lady and is afterwards rejected by her can recover presents of any considerable value which he has made to her, or their value, but cannot recover any that he may have given in order to introduce himself to her acquaintance and gain her favor." That case was decided in 1742, and we know of no reported case in the High Court on the subject between that case and the recent case of Jacobs *v.* Davis, wherein Mr. Justice Shearman held that a lady who had broken off the engagement must return the engagement ring. The learned judge held that the result was the same whether the ring was to be regarded as a pledge or as a gift subject to the condition that the lady, if she broke off the engagement, should return it. Engagement presents are, as the learned judge remarked, a very old custom, and he referred to the action of Abraham, whose servant "brought forth jewels of silver and jewels of gold and raiment and gave them to Rebekah: he gave also to her brother and to her mother precious things" (Genesis, chap. xxiv., v. 53). The latter presents would seem to come within the category of presents given to gain the favor of the family, who might otherwise have objected to this engagement of Rebekah to a person whom they had not even seen. A voluntary gift, if complete and if not contained by fraud, is generally irrevocable when once it has been made, so that, though it is the custom to return the wedding presents of friends if the wedding does not come off, it is not easy to see how those friends could recover them if the donee decided to keep them. It is, however, arguable that they are given on condition that the marriage is solemnized, so that, if that condition fails, the donor can claim their return.

PROSCRIPTION OF WEAPONS.—A lay contemporary writes with reference to the air raid on London on June 13, as follows: "Within a few years from now the development of air craft and submarines may threaten the world with ruin if they cannot be ruled out as weapons of war." Sir Henry Maine, lecturing before Cambridge University as Whewell Lecturer in 1887, says: "An interesting question for us to ask ourselves is whether in the future history of warfare there is likely to be any proscription of weapons, through sheer dislike or horror, as was common in the Middle Ages. I am myself not convinced but that hereafter there may be a very serious movement in the world on the subject of some parts of the newly invented armament." Sir Henry Maine gives instances of the strong detestation which certain inventions of warlike implements have in all centuries produced, such as the crossbow, the musket, and the bayonet, and writes: "Looking back on this long-continued state of feeling on the subjects of new and destructive inventions, we may perhaps wonder that mines and torpedoes, and particularly the torpedo of our day, have not met with harsher feeling [the submarine terror and the air craft engines of destruction had not then been developed]. But the reason why no such attempts as were formerly tried to drive out of use especial weapons are likely hereafter to be seen is that in the first place any act, and especially an act of destruction, is in our day likely to see rapid developments [an accurate forecast]. We know no limit to the power of destroying human life, and, when the extension of the area of this power by a professional class has once set in, it is impossible for us to lay down to what lengths it may go or over what time it may extend. The invention proceeds so rapidly that a peculiarly objectionable form of it can rarely be noted and specified." The trend of international morality in the future is likely to move not so much in the direction of the proscription of weapons, but of the proscription of war itself by a world-wide action of the family of nations for that high purpose.

RECALLING AMBASSADORS.—Owing to the insistent demand of the Norwegian Government Germany has recalled Dr. Michaelis, German Minister at Christiania, by telegraph. He is said to have been concerned in the German conspiracy in Norway for the importation of high explosive bombs in luggage with the intention of getting them deposited in Norwegian ships for their destruction and the killing of Norwegian sailors. The crime with which the German Minister is charged would amply justify the suspension of his exemption as a diplomat from the criminal side of the local jurisdiction and his arrest by the Norwegian Government in self-defense. Such action was taken by the Government of Great Britain in 1717, when the ambassador of Sweden was arrested and his diplomatic documents seized because evidence had been obtained that he was one of the moving spirits in a conspiracy then on foot to overthrow George I. and to set the Old Pretender on the throne. When the reasons were explained, all the diplomats present, except the ambassador of Spain, expressed themselves satisfied, and the count was detained as a prisoner until exchanged for the English ambassador to Sweden, who had been arrested in retaliation. As there was no protest from other Powers, this case is generally accepted as settling the right to arrest or expel an envoy detected in actual conspiracy against the Government to which he is accredited. The insistence by the Norwegian Government on the recall of the German Minister under such circumstances which would justify his arrest has the authority of many precedents in its support. In 1793 the President of the United States demanded the recall of the French Minister for an attempted violation of the neutrality of the United States. The cases, during the present war, of the demand of the United States Government for the recall of the Austrian Minister at Washington, and for the recall of some subordinate members of the German Embassy at Washington, long before the United States itself had become a

belligerent and when it was maintaining an attitude of strict neutrality, are fresh in the public recollection.

COMMON FAME AS GROUND FOR PARLIAMENTARY INQUIRY.—The Lord Chancellor, on June 19, on the motion in the House of Lords to go into committee on the bill to deprive enemy peers and princes of British dignities and titles, urged that in his mind the committee of inquiry constituted by the provisions of the bill should have power to take evidence given either orally or by affidavit based on information and belief, because there might be cases as to which there might be great difficulty in getting strict legal proof. An amendment in committee in that sense was subsequently proposed by the Lord Chancellor and agreed to. This provision is in accordance with the law of Parliament, that common fame is a ground for parliamentary inquiry. This principle is supported by a number of precedents. In the reign of Henry IV. the Commons presented to the King his confessor and a great part of his court on common fame. In the reign of Henry VI. the Commons petitioned for the removal of the Duke of Somerset and his friends on common fame; they desired that these men might be banished from the King's presence during their lives and prohibited from coming to court, and the petition had the desired effect. In the same reign the Commons proceeded against the Duke of Suffolk on common fame and desire of the Lords that he might be committed to the Tower; the Lords conferred with the judges, and answered that they saw no good cause for his commitment unless some special matter was objected, when the Commons by their speaker appeared at the bar of the Lords and informed their Lordships that the Duke of Suffolk had, as was said, sold the realm to the French, and provided his castle with warlike stores; whereupon the Duke of Suffolk was committed to the Tower. In the case, moreover, of the impeachment of the Duke of Buckingham it was held that common fame was a ground for conviction. The Lord Chancellor, in urging that the committee of inquiry "may, if they think fit, act upon any evidence given, either orally or by affidavit, based on information and belief, the grounds of which are stated," has adopted a course sanctioned by the usage of Parliament as the Grand Inquest of the Nation, with a view to the supreme public interests.

CONTRIBUTION TO FUND BEFORE PARTICIPATION THEREIN.—The principle which was enunciated in the notable and oft-cited case of Cherry *v.* Boultbee (4 My. & Cr. 442) was applied and given effect to by Mr. Justice Astbury in somewhat peculiar and interesting circumstances in the recent case of Re National Livestock Insurance Company Limited and Re National General Insurance Company Limited (116 L. T. Rep. 466). That now well-established principle is that where a person entitled to participate in a fund is also bound to make contribution in aid of that fund, he cannot be allowed so to participate unless and until he has fulfilled his duty to contribute. It has been resorted to in so many authorities that it can never again be open to question. Among very modern company cases we may refer to Re Rhodesia Gold Fields Limited; Partridge *v.* Rhodesia Gold Fields Limited (102 L. T. Rep. 126; (1910) 1 Ch. 239); and Re Peruvian Railway Construction Company Limited (113 L. T. Rep. 1176; (1915) 2 Ch. 442). Whether that principle could be regarded as applicable to the facts with which Mr. Justice Astbury had to deal was what the learned judge had to determine. His Lordship came unhesitatingly to the conclusion that it could. And this was so, notwithstanding the contention that there could be no set-off of a debt against calls owing to a company in liquidation: (Re Auriferous Properties Limited No. 1 (79 L. T. Rep. 71; (1898) 1 Ch. 691). In opposition to that contention, however, it was urged that the principle does not depend on set-off, but rests on the broad ground that a creditor cannot receive anything out of a common fund without first making good what he owes to that common fund. Neither company was, in the result, held to be entitled to receive a cash dividend in the liquidation of the other without first satisfying in full the amount of its indebtedness to the other. Accordingly, liberty was given to the liquidator in the liquidation of each company to distribute its available assets in payment of dividends to its other creditors without regard to the debtor company in each case. Having regard to the decision in Rees *v.* Watts (11 Exch. 410), it had to be conceded in such cases as the present that there is no right of set-off within the language of the Statute of Set-off (2 Geo. II., c. 22). Consequently, the application of the rule in Cherry *v.* Boultbee (ubi sup.) is all that has to be considered. That that was an authority governing the present case was not to be gainsaid in the view that Mr. Justice Astbury took of the matter. And that his Lordship rightly decided it was an authority directly in point seems too clear for any doubt whatever.

REDEMPTION BY EMPLOYER OF WEEKLY PAYMENT TO WORKMAN.—As compared with many other of the provisions of the Workmen's Compensation Act 1906 (6 Edw. VII., c. 58), those in regard to the redemption of the employer's liability for a weekly payment payable to an injured workman by the payment of a lump sum are somewhat bare of authority. The practitioner in cases arising under that Act will, therefore, welcome the guidance which he will be able to derive from the exhaustively considered judgments on the subject that the learned judges of the Court of Appeal were afforded the opportunity of delivering in the recent case of Carlton Main Colliery Company Limited *v.* Crawley. It is by section 17 of the first schedule to the Act, it will be remembered, that an employer's power to redeem is conferred upon him. The weekly payment must have been continued for not less than six months. And, subject to that condition, and subject likewise to the workman's right to review the weekly payment, the employer has an absolute right to redeem. That appears from what was laid down by the Court of Appeal in Kendall and Gent Limited *v.* Pennington (106 L. T. Rep. 817), coupled with their subsequent qualifying remarks in Moreland and Sons *v.* Eley (114 L. T. Rep. 22; (1916) 1. K. B. 85). The county court judge has no power to refuse to allow the employer to redeem. The right is altogether unrestricted, excepting as to the period that the weekly payment must have lasted and the workman's right to review. There are ancillary directions in the section as to how the lump sum is to be ascertained where the workman's incapacity for work is permanent. Regardless apparently of these circumstances, the learned county court judge in the present case, while allowing redemption, imposed on the employers what was, in effect, liability to pay further compensation in certain events. That of course was so clearly unwarranted by the provisions of the section and by the various decisions thereon, scant in number though they happen to be, that the award made by His Honor was not even attempted to be supported by the workman's counsel. The award was manifestly incapable of being upheld. But the contention which was urged in behalf of the workman had then to be dealt with. And that was that the various benefits which were vouchsafed to the workman did not constitute a "weekly payment" within the meaning of the section. That difficult point was decided against the workman's contention.

PAYMENT OF RENT IN ADVANCE AND PART PERFORMANCE.—The decision of Mr. Justice Bigham, as he then was, in Thursby *v.* Eccles (70 L. J. 91, Q. B.; 49 W. R. 281) is cited in the

leading text-books, such as Woodfall's Law of Landlord and Tenant, 9th edit., pp. 119, 819, and Foa's Relationship of Landlord and Tenant, 5th edit., p. 355, as an authority—and apparently the only one—for the following proposition: Payment of rent in advance under an oral agreement for a lease, the tenant in fact never having entered into possession of the property, is not such a part performance of the contract as will take the same out of the fourth section of the Statute of Frauds (29 Car. II., c. 3). It affords no exception to the general rule that specific performance of an agreement for a lease will be ordered only if the requirements of that Act have been complied with. This point has given rise to much controversy, as appears from what was said by Lord Selborne, L. C. in Maddison *v.* Alderson (49 L. T. Rep. 303; 8 App. Cas. 467, at pp. 478-9), where the law on the subject was exhaustively dealt with. But that was a case of payment of the purchase money under an agreement for the sale and purchase of land. And that was held by the House of Lords not to be such a part performance of the contract as would preclude the operation of the statute. Mr. Justice Bigham saw no distinction in principle between payment of the purchase money on a sale and purchase and payment of rent in advance under an agreement for a lease. It required, however, the decision of the Court of Appeal to render this point absolutely free from all doubt in the face of what was laid down in Nunn *v.* Fabian (13 L. T. Rep. 343; L. Rep. 1 Ch. App. 35). There it was held that payment by a tenant in possession of one quarter's rent at an increased rate constituted a sufficient part performance of an oral contract between the landlord and the tenant to grant him a lease for a specified term at an increased rent, with the option of purchasing the freehold, to take the contract out of the statute: (see, further, Freeman *v.* Stamp, 1 Stark. N. P. C. 12; and Edge *v.* Stafford, 1 Cr. & J. 391). In the recent case of Chaproniere *v.* Lambert the learned judges of the Court of Appeal (Lords Justices Swinfen Eady, Bankes, and Warrington) were unanimously of opinion that Mr. Justice Bigham had come to a right conclusion in Thursby *v.* Eccles (ubi sup.) in not differentiating payment of rent in advance from payment of purchase money. Their Lordships considered that Mr. Justice Bigham's decision was one that ought to be followed, he having quite properly treated payment of rent in advance and payment of purchase money as being on precisely the same footing with respect to part performance as taking a case out of the Statute of Frauds.

ACCIDENT TO WORKMAN WHILE TAKING SHORT CUT.—The fascination to a workman of taking a short cut, whether he is going to or returning from his place of employment, will ever exist, and is thoroughly comprehensible. But if he meets with an accident while he is proceeding along that tempting short cut, his chance of rendering his employer liable to pay him compensation, under the Workmen's Compensation Act 1906 (6 Edw. VII., c. 58), depends on his ability to establish that nevertheless the accident arose "in the course of" his employment. No one will deny that by the choice of the most risky of several routes whereby to reach a particular place to which a workman is entitled to go he is likely to be regarded as having taken on himself an added peril. If so, any claim to obtain compensation which he might otherwise have had is completely defeated. The recent case of Whittall *v.* Staveley Iron and Coal Company Limited affords a striking illustration of a workman, by his own fault, entirely forfeiting all the rights which the Act conferred on himself and his dependents. It is apparent from the facts of that case that the use of a railway line as a footway to and from the works where the deceased workman was employed was not a term, either expressed or implied, of his contract of service, however much it may have escaped absolute prohibition by the employers. Lord Justice Warrington put the result of the numerous authorities on the subject of accidents arising "in the course of" the employment of workmen very clearly in these words: "Was it an expressed or implied term of his contract of service that the workman should do, or be entitled to do, that which he was doing at the time when the accident happened to him." In the event of the workman or his dependents being in a position to establish such a state of affairs, then what he was doing would have been done "in the course of" his employment. In the present case, all that was proved was that the deceased workman, in doing what he was doing, was not a wrongdoer. That is to say, although he was walking along the railway line at the time when he was knocked down and killed by a passing train, he was not there as a trespasser, but by permission of the railway company. But that did not suffice to prove that, as between himself and his employers, he was doing that which, according to the terms of his contract of service, he was entitled to do. In that respect the facts in John Stewart and Son (1912) Limited *v.* Longhurst (142 L. T. Jour. 378) were plainly distinguishable. Therefore, the decision of the House of Lords in that case, affirming that of the Court of Appeal, could not be relied on as an authority in the present case.

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## Obiter Dicta

ONE OF A LARGE FAMILY.—The plaintiff in Idel *v.* Mitchell, 5 N. Y. App. Div. 268, was a domestic servant.

ALLIED INDUSTRIES.—In Decker *v.* Smith, 225 Fed. 776, it appeared that the defendant sold "nursing bottles and nipples and mufflers for gas engines."

UNCHURCHING HIM.—Monk *v.* Little, 122 Ark. 7, was a controversy over the custody of a church. The court held that Monk was not entitled to it.

CONTRARY TO THE EVIDENCE.—"Highways are not built or maintained for animals or fowls to stray in."—Per Hazard, J., in Park *v.* Farnsworth, 98 Misc. (N. Y.) 482.

WORDS OF ENCOURAGEMENT FOR THE BEGINNER.—"Certainly in a justice court, where it takes a very skillful lawyer to draw a bad pleading, this general allegation, etc."—See Windle *v.* Southwest Missouri R. Co., 168 Mo. App. 596.

JUDICIALLY DECLARED AT LAST!—"It must be noted that the husband's mother was, so to speak, a stranger in the family, one to whom the wife owed no duty in her capacity as such."—Per Neil, C. J., in Gilbert *v.* Ashby, 133 Tenn. 370.

LIKE MARRIAGE.—Speaking of a husband's right as tenant by the curtesy initiate, Judge Vann said in Albany County Savings

Bank *v.* McCarty, 149 N. Y. 85: "Like 'the next cast of a fisherman's net,' it involves a possibility but no actual or potential interest."

ADDING TO THE NATIONAL SUPPLY.—A San Francisco paper recently contained a bit of court news to the effect that one of the Superior Court judges had granted final citizenship papers to William Butter and Heinrich Eggs. A new solution of the food problem, one might say, i.e., by increasing food importations.

PUTTING THE FIRE OUT.—"A proper regard for justice and the decent administration of the law requires that a litigation which has already raged for a quarter of a century over a question which the evidence seems to place beyond reasonable doubt, should be decided upon its merits."—Per Ruger, C. J., in Greenwood *v.* Marvin, 111 N. Y. 440.

THE POOR CONSUMER!—"The appellant by its own affirmative defenses is a vendor of perishable food products. It would be strange indeed if, among its general stock of products, it did not at all times own and possess something that is unfit for human consumption."—Per Fullerton, J., in General Market Co. *v.* Post-Intelligencer Co., 165 Pac. 482.

PANIC IN THE COURT!—"In suggesting that the majority opinion was the result of panic I do not wish to be understood as imputing to my associates of the majority lack of moral or physical courage, but only that their consideration of imaginary calamitous consequences destroyed that mental equipoise necessary for correct interpretation."—Per Timlin, J., dissenting, in State ex rel. Postel *v.* Marcus, 160 Wis. 410.

THE ADVANTAGE OF THE LAST WORD.—"It has been said to us that we should not follow Lord Coke because Stephen in his Commentaries and other writers elsewhere have spoken lightly of the authority and learning of Lord Coke. It may be they have done so. Of course they have all the advantage. They are his successors. If Lord Coke were in a position to answer them, it may be they would regret that they had entered into argument with him."—Per Darling, J., in Rex *v.* Casement, [1917] 1 K. B. 141.

STATUTES AS THEY ARE DRAFTED.—Chapter 785 of the Laws of New York for 1917, amending section 286 of the Highway Law, provides in part as follows: "The light of the front lamps shall be visible at least two hundred feet in the direction in which the motor vehicle is proceeding and shall give sufficient light to reveal any person, vehicle or substantial object on the road straight ahead of such motor vehicle for a distance of at least two hundred and fifty feet." Apparently, it must be possible to see, by aid of a light, a greater distance than the light itself can be seen.

LEGAL ADVERTISING.—With respect to the matter of advertising by lawyers, we beg leave to refer by way of caution to the case of In re Schwarz, 175 N. Y. App. 335, a disciplinary proceeding instituted against an attorney for unprofessional conduct. Referring to one of the advertising letters mailed by the respondent, the court said: "The foregoing reads like the advance bills of the late P. T. Barnum in heralding the approach of the Greatest Show on Earth. Respondent says the case is entirely without precedent. If so, it must be because no member of the bar up to this time has ever perpetrated so flagrant a professional offense." The respondent was severely censured and threatened with disbarment in case of a repetition of the offense. So, it does not always pay to advertise, especially when one advertises too well.

RENDER UNTO CÆSAR, ETC.—In the case of In re Lelands Will, 160 N. Y. Supp. 372, which was an application for letters testamentary, objection was made to the issuance of letters to one of the executors nominated by the will on the ground of "physical deterioration." Adverting to this objection, Surrogate Fowler said: "As I ventured to suggest on the final argument of this application, 'Suppose that one had nominated Cæsar as his executor.' I chose Cæsar as an illustration because, as statesman, politician, soldier, orator and man of letters, he is admitted to have been the greatest genius known to the world. Now Cæsar is conceded to have been an epileptic, a disease causing great physical deterioration, and, as the alienists say, impairing the efficiency of the mind. Yet who of us would not prefer Cæsar for an executor, with all his physical defects, to the ordinary 'hedger and ditcher,' possessed of an absolutely sound body and a congenitally sound mind, unimpaired either by disease or physical deterioration?"

TAKE YOUR CHOICE.—Probably no unofficial precedent is cited by the courts as often as the famous trial in the Merchant of Venice. The fact is not, perhaps, of itself so remarkable. But it does seem rather odd to have Portia's sayings and doings cited as authority in support of both sides of a mooted question, and that is precisely what was done by the North Carolina Supreme Court in the case of State ex rel. Attorney General *v.* Knight, 169 N. Car. 333. The case involved the right of a woman to hold the office of notary public. The majority of the court held that a woman was not eligible to the office and Judge Allen, in the course of his opinion, said: "We cannot yield to the suggestion that the position of notary public, if an office, is not of great importance, and that therefore we may hold that the constitutional qualifications for office do not apply to that position and stop, because when this case is decided it becomes a precedent, and as said by Disraeli, 'A precedent embalms a principle.' If the principle is not safe and sound, we may well adopt the words of Portia, who replied, when urged to do a little wrong that great good may come of it:

> ' 'Twill be recorded for a precedent;
> And many an error by the same example,
> Will rush into the State. It cannot be.' "

Chief Justice Clark dissented in his usual vigorous style, and answered the allusion to Portia as follows: "Singularly enough, the majority opinion in this case quotes from a judge who was a woman (Portia), when she held that Shylock's demand of a 'pound of flesh' must be granted, because else the ruling would be 'recorded as a precedent,' etc. It will be recalled, however, that she almost immediately reversed that ruling, to which she had been over-persuaded, and rendered a just judgment on the merits. That case has been famous for ages as showing the competency of a woman for judicial position, in that she administered justice and was superior to the superstition that erroneous precedents are more sacred than justice. A woman herself, Judge Portia certainly did not intend that her decision should be quoted as authority that a woman could not be a notary." As to which judge had the better of the argument, we leave it to our readers to decide.

**PATENTS**

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# Law Notes

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### The Constitution and the War.

A well-known New York lawyer, Mr. Newton W. Gilbert, addressing the Indiana Bar Association under the title "The Eclipse of the Constitution," expressed some fear that in the extension of the war power valuable constitutional guaranties may be lost to sight. He is not of that evil brood whose affection for the Constitution dates from the time when they first saw a chance to use it in aid of the nation's enemies. He said: "We all alike desire first of all the defeat of the world enemies. To that everything must yield." But seeing beyond the end of the clash of arms he appealed to the bar as the natural guardian of constitutional government to see to it that after victory is attained the sacrifices now made to heroic ends shall not be perverted to selfish purposes.

"When this emergency shall have passed; when victory absolute and permanent shall have been secured; when democracy shall be again enthroned, and might shall be destroyed by right; when God's purpose in this terrible conflict shall have been fully revealed; then ours will be the task to restore in all its vigor the veritable spirit of the Constitution. It will be a stupendous task. Interests of many kinds, powerful and cunning, will seek to serve themselves. In proportion to the success of the operation of these novel ideas now, when officials and constituency alike are animated by high and patriotic endeavor, will be the strength of their argument for further disregard of constitutional limitations. Let us not deceive ourselves. If we retrace our steps, it will be by heroic struggle and renewed sacrifice."

The views presented by Mr. Gilbert are patriotic and lawyer-like; the only possible exception which can be taken to them being that they are at this time capable of perversion or misunderstanding.

In this connection it may be noted that another distinguished New York lawyer, Mr. Charles E. Hughes, speaking at the convention of the American Bar Association was of the opinion that the Constitution was not being subjected to any strain by the present war measures.

"In the unusual circumstances of war, it is natural that there should be some confusion with respect to the constitutional warrant for extraordinary action taken or contemplated. Some altogether misconceive the Constitution; others vaguely fear that we are serving temporary exigency at the expense of substantial rights of citizenship," and he expressed in strong terms his belief that the fear was unfounded. Mr. Hughes emphasized the idea that the framers of the Constitution "did not contrive a spectacle of imposing impotency"; he reminded those who would criticise powerful war measures that "a nation which could not fight would be powerless to secure the blessings of liberty to ourselves and our posterity." He said that the Constitution gave to the Government the power to wage war, and added: "The power to wage war is the power to wage it successfully."

### The Federal Child Labor Law.

A United States District Judge is reported to have held recently that the federal child labor law is unconstitutional. The question is a close and debatable one and the decision does not warrant the indiscriminate criticism of the court in which some journals have indulged. The case is by no means ruled by the decisions in the food and drugs cases, the white slave case, or the lottery ticket case. In each of those cases the law which was sustained closed the channels of interstate commerce against an article whose injurious tendencies were clearly interstate in their operation; which involved some measure of menace to the citizens of the state to which it was shipped. With respect to the child labor law, however, there is some weight to the contention that goods produced by child labor are in no manner distinguishable at their destination from the products of adult labor, and that accordingly the act is one designed to affect only local labor conditions in the state of production. If such is the sole purpose and effect of the act, it is plainly beyond the power of Congress to enact. There is however a broader view of the question which is very apt to commend itself to the federal Supreme Court. Goods produced in one state and shipped to another are sold in competition with the products of the latter state. So long as one manufacturing state permits child labor, the manufacturers of every other state must compete with that underpaid labor. The wages of adults are forced down, and a constant incentive is maintained to evade local regulations against child labor or to procure their relaxation. The situation is analogous to that involved in the protective tariff which many eminent statesmen have deemed essential to the welfare of American industry. And if the view thus indicated is one which may rationally be held, the question becomes a legislative one, and the court will accept the legislative determination thereon.

### A Challenge to the Bar.

A recent newspaper comment on the annual address of the president of the Florida Bar Association concludes as follows:

"The speaker admits that justice is both denied and delayed—he admits the responsibility of the lawyers; then he asks that lawyers exercise more influence in selecting judges

because 'We know the qualifications of lawyers for the bench better than any one else.' So they do, but is it our experience that lawyers support one of their number for the bench because of the candidate's fitness or competence? Assure us of that and we would pray that lawyers be allowed greater weight in the selection of all other officials—we might be willing to have the American Bar Association name several candidates from which number we could select a president; that they legislate for us—almost that they expend the proceeds of taxation for us.

"But why should we expect lawyers to prove themselves better advocates of law and justice and good government in the future than they have been in the past? There's the rub. Will the lawyers kindly begin to show us that they are living up to the standards laid down by Mr. Taft and Mr. Bryan respectively, or must we accept them by faith or reject them in toto according to the former practice? It is up to them."

It sounds like a poser, but a little consideration reveals the fallacy. The proposition is that as long as there are manifest imperfections in the work committed to the bar, that body is unworthy of further confidence or power. *Quod erat demonstrandum*—in Utopia. But in this more or less sinful world where is our critic to get the men with a record of one hundred per cent of achievement in their own sphere to whom may be given the power withdrawn from the recreant legal profession? Many and grave faults certainly exist in the administration of justice. But they are no graver and no more numerous than those to be found in any other department of human activity. Educational convocations, editorial associations, physicians' conventions, the meetings of business associations, the conferences of church dignitaries, all dwell on the same theme of deficiencies which have been recognized and reforms which are hoped for. And despite all this our brethren of the press will do well to take the doctor's physic and the lawyer's law, not because either is perfect but because both are better than their own efforts could produce.

### Dry Zones.

The liquor traffic, which has suffered many and severe blows in the last year, has recently gained, at least temporarily, a small victory, a New York act forbidding the sale of liquor within a certain distance of munition works and certain other government plants being held unconstitutional by a Supreme Court Justice.

"The order is virtually an absolute prohibition against the sale," Justice Cropsey said, "for while in effect it only prohibits the relator from selling in a prescribed territory in effect it prohibits him from selling anywhere. He is in the same position as if he had no license. While he is thus deprived of selling his goods his competitors within one block are permitted to sell."

Under the licensing system in vogue in New York, a license is apparently given rather more of standing than in many other states, the general rule being that a license is not property within any clause of the Constitution and that it is taken subject to the effect of subsequent laws though these may lessen or destroy the value of the right. (See 15 R. C. L., p. 286.) Thus an order previously revoked prohibiting the sale of liquor within three miles of a church may be restored after the grant of a license to sell within the prohibited zone. *State* v. *Doss,* 70 Ark. 312. So it has been held that license fee may be increased for the unexpired term of a license. *Moore* v. *Indianapolis,* 120 Ind. 483.

Whether a "dry zone" may be established by an executive or military order in war time presents an interesting question which has not yet been determined. Since necessity is the sole justification for martial law, a showing of some exigency would certainly be prerequisite. Thus in *Herlihy* v. *Donohue,* 52 Mont. 601, a militia commander acting under a proclamation of martial law at the scene of a labor riot, was held liable in damages for ordering the destruction of the stock of a saloon keeper who failed to obey an order for the closing of saloons. The closing order itself however was apparently deemed to be valid, the court saying: "It is not pretended that the arrest and imprisonment of Herlihy and the closing of his place of business during the insurrection would not have been equally efficacious as a means of preventing drunkenness, disorder or rioting. Under constitutional government such as ours, the destruction of private property without compensation to the owner must be the last resort, available only in the presence of imminent and overwhelming necessity which brooks no delay." A similar holding has been made as to the destruction of liquor in time of war. *McLaughlin* v. *Green,* 50 Miss. 453. Lord Mansfield in *Mostyn* v. *Fabrigas,* 1 Cowp. 174, refers to a case in which a recovery was sustained against Admiral Boscawen stationed off the coast of Nova Scotia who pulled down some shanties in which sutlers sold liquor to the sailors. It is to be noted however that a subordinate officer is protected in obeying an order for the destruction of liquor (*Herlihy* v. *Donohue,* supra; *McLaughlin* v. *Green,* supra; *Pollard* v. *Baldwin,* 22 Iowa 328). A presidential order for the forcible establishment of a dry zone would therefore leave the liquor dealer in much the situation of the man whose attorney assured him through the bars of his cell that he could not be put in jail.

### Exemption from Taxation.

With war taxes bearing heavily on almost every form of property, the question of the propriety of exemptions whereby other property is of necessity more heavily burdened becomes of considerable interest. The principal exemptions are of course those attaching to property used for religious and educational purposes. If any exemption of private property is defensible, there can be no question that it should be allowed to property thus used for objects wholly divorced from personal profit and designed wholly for the public good. Neither religion nor education is so well supported that it could not do more and better work with a larger income, and the imposition of a tax must inevitably lessen pro tanto the work which is now accomplished. The objection to the exemption lies in the fact that it is inevitably unequal. The man who cannot afford a college education for his children must pay more taxes that a college property may be exempt. A member of an obscure sect must pay more taxes because of the exemption of the million dollar church of another denomination. In 1875 President Grant in a message to Congress said:

"I would also call your attention to the importance of correcting an evil that, if permitted to continue, will probably lead to great trouble in our land before the close of the nineteenth century; it is the accumulation of vast amounts of un-

taxed church property. In 1850, I believe, the church property of the United States which paid no tax, municipal or state, amounted to about $83,000,000. In 1860 the amount had doubled. In 1875 it is about $1,000,000,000. By 1900, without check, it is safe to say this property will reach a sum exceeding $3,000,000,000. So vast a sum, receiving all the protection and benefits of government, without bearing its proportion of the burdens and expenses of the same, will not be looked upon acquiescently by those who have to pay the taxes. In a growing country, where real estate enhances so rapidly with time, as in the United States, there is scarcely a limit to the wealth that may be acquired by corporations, religious or otherwise, if allowed to retain real estate without taxation. The contemplation of so vast a property as here alluded to, without taxation, may lead to sequestration, without constitutional authority and through blood."

But while the increase in the value of church property has more than equaled the President's estimate, no such popular dissatisfaction as he predicted seems to have arisen. This is doubtless due to the fact that church property whatever its value consists in the main of a multitude of small properties, each honestly devoted to the religious needs of a community. Property of that kind has not resulted here, as it has in some parts of Europe, in the creation of a large and privileged clerical class, whose luxurious ease contrasts bitterly with the poverty of the laboring and agricultural classes. Until such a condition arises it is not probable that any substantial sentiment will arise against the exemption of property which, despite small and inevitable inequalities, is devoted to the promotion of the public welfare. No one man's interest is so divorced from that of his fellows that he is not benefited by their mental and spiritual advantages though he may not share directly therein.

#### Shorter Opinions.

The Committee of the American Bar Association on reports and digests reported at the recent meeting of the Association that the length of judicial opinions has increased thirty per cent in the last twenty years. Obviously there should have been instead a corresponding decrease, for with the number of adjudged cases in every state at the present time the ordinary question presented to the court lies within very narrow limits. The report of the committee strikes directly at the root of the trouble, suggesting that the judicial opinions "should not give the impression of being discoveries by the judges of what they never knew before, but that they should read as if the judge knew the existing state of the decisions and assumed that every one else did, and that it was his business to show the necessary development from established principles and their application to the particular case."

The writing of good judicial opinions is an art in itself, and one to which far too little attention is paid. The judges are painstaking and conscientious in formulating their decisions, but the matter of putting them into permanent form for future use not infrequently seems to receive but little consideration, and is left wholly to the individual judges with little or no effort to establish a standard of opinion writing for the court. The presence of stenographers deprives verbosity of its labors, and the reports are burdened thereby. A comparison of the opinions of Justice Grier of the United States Supreme Court with some modern opinions will clearly illustrate the way in which the increase in volume pointed out by the committee has come about. It needs but a little attention to the particular point of better opinions to produce them, and the report of the committee may go far toward obtaining it, without enlisting the services of a "judicial superintendent" to blue pencil the judicial product.

#### Utilizing Convict Labor.

At this time when every industrial resource is being mobilized in aid of the prosecution of the war, the mind naturally turns to our millions of unused acres and to the thousands of able-bodied men who are rusting away in prison, and whose labors properly directed would go far toward solving the food problem. The feasibility of making use of this otherwise wasted industrial asset is made plain by the letters of a number of wardens to the National Committee on Prisons and Prison Labor (see Journal of Am. Inst. of Crim. Law and Criminology, vol. III, p. 455). Warden Tynan of the Colorado State Penitentiary writes: "In my judgment sixty per cent of the sane able-bodied men now confined in the penal institutions both state and federal of the United States are trustworthy and if properly handled can be made available for work anywhere in the United States. . . . Colorado is farming thousands of acres of land on its state farms with prisoners and maintaining six large road camps constantly in the construction of roads." Manager Fugua of the Louisiana Penitentiary at Baton Rouge writes: "Our prison population is about 1,900, one-third of which is employed in the construction of levees on the Mississippi River and the other two-thirds in farm work." Warden Read of the Stillwater (Minnesota) prison writes: "We have within the last few weeks purchased additional land for the prison farm and are now doing intensive farming on 800 acres, employing from 100 to 150 men in this work. We have finished planting 80 acres of potatoes and will have in large crops of vegetables, grain, corn, etc." Superintendent Walker of the Vermont State Prison at Windsor says: "I am a firm believer in the honor system, using convict labor on the prison farm, 42 miles from the prison, with only a civilian foreman, no guards, guns or dogs being allowed on the place." Warden DeKay of the Idaho State Penitentiary says: "I became warden of the penitentiary January 1st, this year, and immediately investigated to ascertain the legitimate employment followed by each prisoner prior to his commitment. I discovered prisoners highly trained in the handling of horses, hogs, dairies, farms and even turkeys. I have placed these men in charge of various departments of the penitentiary. I employed one man at the prison reservation and one man at the prison farm—42 miles from the prison—as farm superintendents, who are carried on the prison payroll as guards, drawing a slightly higher salary than the regular guards. The sentences of the men are disregarded to a great extent in making them 'outside trusties,' the only requirements being that they shall convince me that they are trying to make good. I use the honor system outside of the walls, no guns being allowed with, around, or over the prisoners."

The detailed reports of these experienced prison officers from which brief excerpts have been given should convince the most skeptical that it is possible to make use of this important labor asset in our national crisis and at the same time do much toward rehabilitating thousands of convicts, giving them not only healthful and useful work

but the inspiration which will come with the knowledge that they are serving their country and repaying the debt they owe to society.

### A Patriotic Profession.

No better or more clean-cut declaration of true Americanism could be made than that embodied in the resolution adopted at the recent meeting of the American Bar Association:

We are convinced that the future freedom and security of our country depend upon the defeat of German military power in the present war.

We urge the most vigorous possible prosecution of the war with all the strength of men and materials and money which the country can supply.

We stand for the speedy dispatch of the American Army, however raised, to the battle-front in Europe, where the armed enemies of our country can be found and fought and where our own territory can be best defended.

We condemn all attempts in Congress and out of it to hinder and embarrass the Government of the United States in carrying on the war with vigor and effectiveness.

Under whatever cover of pacifism or technicality such attempts are made, we deem them to be in spirit pro-German and in effect giving aid and comfort to the enemy.

The characteristic virtue of the resolution lies not so much in its patriotism as in its clear-sightedness. It is the work of men trained to think clearly to an ultimate issue and to brush away sophistries and subterfuges. The Bar Association of the state of Minnesota has just given a pointed application of the same principles by voting, with but one dissenting voice, to prefer charges for the disbarment of a member of the local bar who was alleged to have taken part in public meetings protesting against the draft and against sending troops to France, the effect of such conduct being as the resolution of the Minnesota Bar recites "to render aid and comfort to the German government." The legal profession in other states has undoubtedly an occasional black sheep of the same sort, and the action of the Minnesota Bar is worthy of prompt imitation.

### The Selective Draft.

The constitutionality of the selective draft law has been sustained recently in two opinions of widely different style, each a model of its kind. The California Supreme Court (*Claudius* v. *Davie,* 165 Pac. 689), after stating the contention that the draft law is in violation of the Thirteenth Amendment and the corresponding section of the state constitution, disposes of it contemptuously in six words, "The claim is utterly without merit." Federal Judge Speer, confronted with the same contention, trained on it the batteries of his well-known logic and eloquence, saying:

"To agree to this contention we must conclude that the soldier is a slave. Nothing could be more abhorrent to the truth, nothing more degrading to that indispensable and gallant body of citizens trained in arms, to whose manhood, skill and courage is, and must be, committed the task of maintaining the very existence of the Nation and all that its people hold dear. The Grand Army of the Republic, the Confederate Veterans, and the Sons of Veterans are not maintained to preserve the tradition of slavery. Nations do not pension slaves to commemorate their valor. They do not 'give in charge their names to the sweet lyre,' nor does—

> Sculpture in her turn
> Give bond in stone and ever-enduring brass
> To guard and to immortalize the trust.

The contention, which folly and treason have frequently inspired, that Congress cannot employ the national army beyond the seas has rarely met a more forceful answer than in the same opinion. Judge Speer said in part:

"Were this contention maintainable, the misguided men who for their personal ease advance it might all too late discover their fatal error. They would discover it in the flaming homesteads, in the devastated fields, in murdered brethren, in outraged wives and daughters; in their lands, their factories, their merchandise, their stock, their all coolly appropriated by the conquerer as his own; their institutions destroyed; homeless, landless, and beggars, to spend whatever intervals of degraded life remains to them in abject slavery to the conqueror.

"But our organic law does not so shackle the gigantic energies of the great Republic. After the enumeration of the powers of Congress, among them, as we have seen, 'the power to raise and support armies,' in clause 17 of article 1, section 8, it provides the power to 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof.' Here is the great reservoir of power to save the national existence.

"It is said that there is no express power to send armies beyond the sea. True; but there is no express power to enact the criminal laws of the United States; none to convey the public domain; to build a transcontinental railroad; nor to construct the Isthmian Canal; nor to create the Interstate Commerce Commission; nor to declare the Monroe doctrine; nor to make the Louisania Purchase; nor to buy Alaska, or to take over Porto Rico and the Philippines. This has all been done under the great power to promote the general welfare, just as the selective Army will be created under the law here assailed—'to provide for the common defense'—and beyond and above all is the inherent power of every nation, however organized, to utilize its every man and its every energy to defend its liberty and to defeat the migration to its soil of mighty nations of ferocious warriors, whose barbarous inhumanity for three years has surpassed all others since the death of Attila, the Scourge of God. The writs are denied."

### Injunction Against Libel.

In the recent case of *Howell* v. *Bee Pub. Co.,* 100 Neb. 39, the court sustained a refusal to enjoin the publication, on the eve of an election, of a letter of withdrawal written by a candidate some time earlier and afterwards reconsidered by him. While the case is novel in its facts the publication in question was in the nature of a libel, and there is abundant authority for the proposition that the publication of a libel will not ordinarily be enjoined. But in a case where the falsity of the publication is clear, and no good motive can be advanced for its issuance, good reasons for the rule are by no means so plentiful. Certainly the rule as to the existence of an adequate remedy at law does not afford such a reason. It is doubtful whether the recovery for a personal tort ever really makes the plaintiff whole. There must always be a field of remote consequences which the courts cannot consider but which are none the less real. Take, for instance, the facts of the Nebraska case. The mayoralty for which the plaintiff was

running, if gained by him, might have proved, as it has in other cases, a stepping-stone to high political preferment. For that loss no award of damages could be made. In *Francis* v. *Flinn,* 188 U. S. 385, it was said obiter that damages are an adequate remedy for all publications, but in *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, an injunction against an injurious publication was sustained. The intent to defeat a candidate for office by the publication of a falsehood has been held to constitute malice. *Pattangall* v. *Mooers,* 113 Me. 412. So, by the holding in question the court refuses to prevent a malicious injury for which no genuine compensation in damages can be made. If such is the law it certainly should be changed. The decision of the Nebraska court is rested on a constitutional provision that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." But as was cogently pointed out by Sedgwick, J., in a separate opinion, there is a distinction between enjoining the use of the liberty and enjoining its abuse.

**International Courts.**

The end of the present world war will afford an unexampled opportunity for the realization of the dream of many eminent statesmen for a true international tribunal or parliament. In the past nations have been too jealous in retaining every indicia of their sovereignty to make possible anything more than general conferences such as that at the Hague, culminating perchance in a treaty which is but a "scrap of paper" in the hand of an unscrupulous monarch. But after the events of the last three years, with the principal nations of the world drawn into an alliance which has been cemented with blood, something more practical will certainly be possible. It is understood now if it never was before that a law not backed by a force adequate to enforce it is no law at all. The sacrifices of the past years certainly will not be wasted; the lessons learned at such cost will not be forgotten. It is not too much to expect that there will be erected an international tribunal, whose decrees are enforceable by an international police. Mr. Raleigh C. Minor, writing in the Virginia Law Review on "International Organization," presents an ingenious solution of the primary difficulty, the disproportion in the population of nations. A vote by population would make, say, Russia, the United States and China masters of the world. A vote by states, on the other hand, would give a like supremacy to the Balkan States and a few minor allies. Mr. Minor's suggestion is as follows: "A measure, before it becomes a law, must pass the conference twice by a majority of the votes thereof as hereafter described. At the first passage each constituent State, regardless of population, size or importance, shall be entitled to an equal voice with every other State. At the second passage each State shall have a vote proportionate to its 'representative,' not its total, population, which is to be estimated (except in the case of Japan and China) by adding to the number of its white population a certain proportion (say, one-third) of its colored or mixed population. Japan should be treated as if the Japanese were of white race; China, according to special agreement." The logic of events has made an international federation inevitable; its details are many and complex but the minds of the legal profession of this and other nations are fitted to cope with them. It may be that before our own bar, now conspicuous in the display of true patriotism, may lie the proud destiny of being foremost in the formulation of a true and abiding world law.

**Christianity and the Common Law.**

The aphorism that Christianity is part of the common law has been current in the law reports for many years (see *Rex* v. *Woolston,* 2 Stra. 834; Taylor's Case, 1 Ventr. 293). It has been repeated in many American cases, though there was not the excuse of an established church to give it force. (See *State* v. *Chandler,* 2 Harr. [Del.] 553; *People* v. *Ruggles,* 8 Johns. [N. Y.] 290; *Updegraph* v. *Com.* 11 S. & R. [Pa.] 394.) Whatever the saying may originally have been intended to mean, it is well settled in the United States that it is true only in the qualified sense that the Christian religion is not to be maliciously and openly reviled and blasphemed against (*Vidal* v. *Philadelphia,* 2 How. [U. S.] 127). In the land of its origin, after having been sharply challenged by Lord Coleridge in Ramsey's Case, 15 Cox C. C. 231, the aphorism fell into disuse until it was evoked by counsel in *Bowman* v. *Secular Society* [1917] A. C. 406, where the folly of attempting to take it in any literal sense was aptly set out by Lord Sumner, who said: "My Lords, with all respect for the great names of lawyers who have used it, the phrase 'Christianity is part of the law of England' is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: 'No man can be expected to be faithful to the authority of man who revolts against the government of God.' One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? Best, C. J., once said in *Bird* v. *Holbrook* (1828) 4 Bing. 628, 641 (a case of injury by setting a spring-gun): 'There is no act which Christianity forbids that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England'; but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. 'Thou shalt not steal' is part of our law. 'Thou shalt not commit adultery' is part of our law, but another part. 'Thou shalt love thy neighbor as thyself' is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England. Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities, and its sanctions, even in courts of conscience, are material and not spiritual." So far as the ancient saying may lend sanction to prohibitions of blasphemy it survives, but so far as it is a relic of the evil days of the union of church and state, the days of the stake and the thumbscrews, the courts of last resort of two great nations have given it a deserved quietus.

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"Duty of a citizen when war breaks out, if it be a foreign war, and he is abroad, is to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable and adhere to the regular established government." Clifford, J., The William Bagaley, 5 Wall. 408.

## THE EFFECT OF WAR ON TREATIES.

The effect of war upon the treaty obligations of belligerents is a moot question. It is impossible to deduce a rule of general application from international law, the jus belli or from the practice of nations,—indeed, that practice, based largely upon self-interest and power, has been wholly lacking in consistency, certainty or uniformity, a practice well illustrated by a remark of Bismarck in his Reflections: "No treaty can guarantee the degree of zeal and the amount of force that will be devoted to the discharge of obligations when the private interest of those who lie under them no longer reinforces the text and its earliest interpretation."

The subject is of far-reaching importance. During the present hostilities, the question of the right of a resident alien enemy to resort to our courts for the protection of his rights has arisen, and without doubt other and more complicated cases will arise demanding authoritative judicial determination.

That war extinguishes treaty stipulations between the contracting parties is a doctrine enunciated by many writers on the law of nations; others on the contrary hold that a declaration of war does not *ipso facto* dissolve treaties between the belligerent states, a doctrine sustained by the Supreme Court of the United States; while nearly all are in accord as to certain conventions which concededly survive, and herein we discern the beginnings at least of a rule.

Thus Halleck in his International Law says: "A declaration of war does not *ipso facto* extinguish treaties between the belligerent states. Treaties of friendship and alliance are necessarily annulled by a war between the contracting parties, except such stipulations as are made expressly with view to a rupture such as limitations of the general rights of war. So of treaties of commerce and navigation, they are either generally suspended or entirely extinguished by a war between the parties to such treaties. All stipulations with respect to the conduct of the war, or with respect to the effect of hostilities upon the rights and property of the citizens and subjects of the parties, are not impaired by supervening hostilities,—this being the very contingency intended to be provided for,—but continue in full force until mutually agreed to be rescinded. There are many stipulations of treaties which, although perpetual in their character, are suspended by a declaration of war and can only be carried into effect on the return of peace."

Kent says: "As a general rule, the obligations of treaties are dissipated by hostilities. But if a treaty contains any stipulations which contemplate a state of future war, and make provision for such exigency, they preserve their force and obligation when the rupture takes place. All those duties, of which the exercise is not necessarily suspended by the war, subsist in their full force."

Woolsey regarded the continuance of treaty stipulations as a particular question to be decided upon the circumstances of each case and the nature of the stipulation. In his view all stipulations permanent in their nature survived, e. g., recognition of independence, fixation of boundaries and territorial cessions.

The elder writers Grotius and Vattel predicated the question on the origin of war. If the cause of war grew out of a breach of the treaty, its provisions were annulled, but if the war arose from cases outside of the treaty, rights thereunder could be lost only by conquest. Considering this theory Woolsey says: "This rule which would be a very important one if admitted, and yet perhaps one attended with practical difficulties, is not, so far as we are informed, insisted on by later writers, nor introduced into the code of nations." And Richard Henry Dana adverting to the same point says: "It seems plain that the test of survival is to be found in the nature of the provision and not in the origin of the war. If, indeed, the war amounts to a mutual abrogation of the treaty, the rights under it cease, from that fact; but if the war has its origin in a breach of the treaty by one party, the rights of the other under the treaty cannot be affected. They may be lost by the result of the war,—that is, by conquest—as any other right may be; but not by the fact that the other party begins a war for the purpose of escaping the obligation of the treaty in respect to those rights. So if a war arises from a cause independent of the treaty, the survival of any clause in the treaty must depend upon its nature, and the circumstances under which it was made."

It was the opinion of Wheaton that in case of war between the contracting parties the treaty expires except as to stipulations that are made expressly with a view to a rupture, such as the period of time allowed to the respective subjects to retire with their effects, or other limitations of the general rights of war. Such was the stipulation contained in the tenth article of the treaty of 1794 between Great Britain and the United States, providing that private debts and shares or moneys in the public funds, or in public or private banks belonging to private individuals, should never, in the event of war, be sequestered or confiscated. "There can be no doubt," says Wheaton, "that the obligation of this article would not be impaired by a supervening war, being the very contingency meant to be provided for, and that it must remain in full force until mutually agreed to be rescinded."

In the case of *Society for the Propagation of the Gospel in Foreign Parts* v. *Town of New Haven*, 8 Wheat. 464, Daniel Webster contended the general rule to be that whatever subsists by treaty is lost by war, and that consequently the effect of the war of 1812 between the United States and Great Britain was to put an end to the treaties of 1783 and 1794, and to rights derived under them, unless they had been revived by the treaty of peace at Ghent, which was not done. But the court held to the contrary, saying: "We are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have again to struggle for

both upon original revolutionary principles. Such a construction was never asserted and would be so monstrous as to supersede all reasoning." The same doctrine was upheld by the English Court of Chancery as to American citizens holding lands in Great Britain under the treaty of 1794, in *Sutton* v. *Sutton,* 1 Russell & Milne 663.

In the controversy between the American and British governments respecting the rights of fishing on the coasts of the British dominions in North America (afterwards settled by the treaties of 1818 and 1854), Great Britain took the position that she knew of no exception to the rule that all treaties are put an end to by a subsequent war. This position appeared to the American Minister, John Quincy Adams, to be "unwarranted by any of the received authorities upon the law of nations, unsanctioned by the practice and usages of sovereign states, suited in its tendency to multiply the incitements to war and to weaken the ties of peace between independent nations, and not reconcilable with the admission that treaties usually contain recognitions and acknowledgments in the nature of perpetual obligation." Mr. Adams (4 American State Papers 356) insisted that "there were many exceptions to the rule by which treaties between nations are extinguished by war, that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in peace and war or exclusively during war, to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity and to all engagements which are in the nature of perpetual obligation, such as the treaty of peace of 1783."

Considering these conflicting views we see, as has been said, the beginnings of a rule. Certain conventions concededly are not dissolved by a declaration of war, such as treaties of cession and boundary treaties, and treaties entered into in contemplation of war for the purpose of regulating its operations. Examples of such are the Declaration of Paris of 1856, the St. Petersburg Declaration of 1868, the Geneva Conventions of 1864 and 1906, and the Hague Conventions of 1899 and 1907. The Declaration of London of 1909, signed by nine of the present belligerent nations, intended to regulate the conduct of nations in future war, and which would fall in this same class, unfortunately was not ratified before the outbreak of the present war.

This then is as far as the present rule may go. So far as the great body of treaty relations between the belligerents is concerned there still remains doubt as to the precise effect of war upon particular stipulations.

Nor is a rule deducible from the conduct of states at the conclusion of wars. The Treaty of Paris which ended the Crimean War provided that regulations in force before the war should obtain "until the treaties or conventions existing before the war between the belligerents were renewed or replaced by new agreements." In 1871 the Treaty of Frankfort revived treaties of commerce between France and Germany, making no reference to other ante-bellum treaty stipulations. The Treaty of Paris between the United States and Spain makes no reference to the ante-bellum treaties between the two countries, but evidently they were regarded, not only as not extinguished by the war but as revived by the treaty of peace for in the Treaty of Friendship and General Relations, proclaimed in 1903, all treaties and conventions prior to the Treaty of Paris were expressly abrogated and annulled with the exception of the Claims Convention of 1830, which was expressly continued in force. In the Treaty of Lausanne of 1912, Italy and Turkey, the contracting parties, settled the question for themselves that the war did not abrogate, but merely suspended, treaties existing at its outbreak, for Article 5 provided that "all the treaties, conventions and engagements concluded or in force between the two high contracting parties before the declaration of war shall again enter into immediate effect, and the two governments, as also their respective subjects, shall be placed toward one another in the identical situation in which they were before the outbreak of hostilities."

If the sovereign laws of war, regardless of congressional enactment, give the state the right to seize the person, confiscate the property and debts of the subject of a hostile power, who under the law is an alien enemy, and to suspend or extinguish existing contracts and deny the right or privilege to sue in its courts, that of course would operate as an abrogation of treaty stipulations guaranteeing those rights. A few of the older writers on public law, Bynkershoek, Grotius and Puffendorff, upheld the doctrine. But Bynkershoek, who maintained the broad principle that in war everything done against an enemy is lawful, that he may be destroyed, though unwarned and defenseless, that fraud or even poison may be employed against him, and that a most unlimited right is acquired in his person and his property, admits that war does not transfer to the sovereign a debt due to his enemy and therefore if payment of such debt be not exacted peace revives the former right of the creditor "because the occupation which is had by war consists more in fact than in law." He adds: "Let it not be supposed that it is only true of actions that they are not condemned *ipso jure,* for other things also belonging to the enemy may be concealed and escape condemnation." Magna Charta provided that merchant strangers in the realm of England at the beginning of a war should be protected from harm in body and goods until it be made known to the high authorities of the nation how British merchants should be treated in the enemy's country and they were to be dealt with according to such treatment—a humane provision enthusiastically approved by Montesquieu in the Spirit of the Laws.

In *Brown* v. *United States,* 8 Cranch 110, the question arose whether the declaration in the war of 1812 with Great Britain gave the right to seize enemy's property found on land at the commencement of hostilities, in the absence of legislative act authorizing such seizure. Justice Story in a dissenting opinion maintained the right of the state to confiscate debts and property found in the country. Chief Justice Marshall in the prevailing opinion said: "The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received that the right to them revives on the restoration of peace would seem to prove that war is not an absolute confiscation of property, but simply confers the right to confiscation. . . . The proposition that a declaration of war does not in itself enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt." And it was held that power of confiscation was in the legislature. Justice Marshall said in the same opinion: "It may be considered as the opinion of all who have written on the jus belli

that war gives the right to confiscate but does not itself confiscate the property of the enemy."

In a recent case in the City Court of New York (*Fritz Schulz Jr. Co.* v. *Raimes Co.,* 164 N. Y. Supp. 454) the question arose whether the state of war between the German Empire and the United States dissolved their treaty relations. The facts do not appear, but the matter came before the court on the defendant's motion to restrain prosecution on the ground that the plaintiff was an alien enemy. Adopting the doctrine of Justice Marshall in *Brown* v. *U. S.* supra, the court said: "It thus appears, from authoritative opinions of publicists who have written modernly on the jus belli, that war gives the right to confiscate, but does not itself confiscate, property or debts of the enemy. Therefore, in the disposition of an application to expound the effect of the declaration of war lately had between the United States and the Imperial German Government a rule ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, which would be opposed to the most learned and respected opinion of modern jurists and publicists everywhere. There being no act of Congress as yet passed which bears upon this subject, nor a proclamation of the President under the authority conferred upon him by the resolution of Congress declaring a state of war to exist, which confiscates enemy property within the United States upon a declaration of war, it seems to me entirely free from doubt that even an alien enemy may still sue in our courts, provided he is a resident here and entitled to the protection which the President's proclamation extends to him. . . . Moreover, if these views of the present status of public law in respect of the property and credits of alien enemies be not grounded upon true principle, there had been negotiated and adopted, as early as 1799 (8 Stat. 162), a treaty between the kingdom of Prussia and the United States, which was reaffirmed by the treaty of 1828 (8 Stat. 378), article XXIII of which reads as follows: 'If war should arise between the two contracting parties, the merchants of either country, then residing in the other, shall be allowed to remain nine months, to collect their debts and settle their affairs, and may depart freely carrying off all their effects, without molestation or hindrance,' etc. And article XXIV reads as follows: ' . . . And it is declared, that neither the pretense that war dissolves all treaties, nor any other whatever shall be considered as annulling or suspending this and the next preceding article; but on the contrary that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations.' [Article I of the treaty, not quoted by the court, provides that citizens of Prussia are to have the same security and protection as natives in the country wherein they reside.] This court must take judicial notice of the public acts of the United States and its several departments, and therefore, until this treaty is denounced as nonoperative, it would seem to confer upon alien enemies of German nationality, notwithstanding the existence of a state of war, the right to collect their debts by whatever process or remedy the United States or its several states and territories afford, pursuant to the provisions of our Federal Constitution that the treaties of the United States with foreign powers shall be the law of the land, anything in the Constitution or laws of the several states to the contrary notwithstanding. That war dissolves all treaties between the contracting parties is a principle enunciated by many of the legal writers upon public law; but as express promises and engagements of nations should be inviolable, and the duty of the nation is to take care that she be not engaged in anything contrary to the duties which she owes to herself and others, and as nations may in their treaties insert such clauses and conditions as they think proper to make them perpetual, or temporary, or dependent upon certain events, it is competent to agree to abandon this principle of the law of nations and to contract with a view to obviate its effect. Although the treaty may become very oppressive to one of the contracting parties, it is not thereby revoked. Its revocation or denouncement requires a public act of which the judicial courts, executives and legislative assemblies must take notice."

In *Posset* v. *D'Espard,* 100 Atl. 893, Chancellor Lane of the Court of Chancery of New Jersey, refused to stay a suit brought by a subject of Germany, resident in the United States, for the preservation of rights as a stockholder in a New Jersey corporation. This case is epitomized in the August issue of LAW NOTES, p. 93.

All doubt on the subject herein discussed would be resolved by the adoption of the project submitted to the Powers by the Institute of International Law at its session in Christiania in August, 1912 (see 7 Am. Journal of Int. Law 153). That project was embodied in eleven articles, the first of which advanced the general proposition that a state of war does not impair the binding force of treaties previously concluded between the belligerents. In other words, all treaties continue to have obligatory force in time of war save those mentioned in subsequent clauses of the project. It is to be hoped that when the civilized nations have happily returned to peace this comprehensive scheme, prepared by the highest technical authority in the world, will receive the consideration its great importance deserves.

As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their chief object is not only to promote a friendly feeling between the people of the contracting countries but to avoid war and secure a perpetual peace, it is the moral duty of the contracting parties to maintain them inviolate, not only in time of peace but also *in flagrante bello* in so far as it can be done without the sacrifice of individual rights or those principles which lie at the foundation of personal and national liberty. Immanuel Kant scoffed at international law as "a word without substance (*ein Wort ohne Sache*), since it depends upon treaties which contain in the very act of their conclusion the reservation of their breach." And pessimists in international morality deny the sanctity of treaties or their binding force. We are not unmindful of the absolute disregard not only of treaty stipulations but of the most solemnly affirmed rules of the law of nations in the present world war. Nor do we forget the Declaration of 1818 at Aix la Chapelle when the continental powers declared for the first time that "it was their unalterable determination never to swerve from the strictest observance of the Law of Nations, either in their relations with one another or with other states," and yet within the next four years these same powers authorized interventions in Naples, Piedmont and

Spain and even sought to extend the system to Spanish America, a proposal which inspired the promulgation of the Monroe Doctrine. An even more flagrant violation was that of the Declaration of London in 1870, wherein North Germany, Austria-Hungary, Great Britain, Russia and Turkey recognized that "it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty without the consent of the contracting powers," and yet at the precise time were acquiescing in a shameful violation on the part of Russia of the Treaty of Paris of 1856, forbidding the maintenance of a fleet in the Baltic Sea. Nevertheless there are inspiring instances where treaties have been an abiding force. Witness the voluntary action of the United States in respect to the Hay-Pauncefote Treaty of 1901, on the question of exempting coastwise vessels using the Panama Canal from the payment of tolls.

The days of the rivalry of kings when there was no place for moral distinctions have passed. Modern science and commerce and new political ideals are destroying the ancient conceptions of government, compelling nations to adopt common principles of external action. International Law, long in embryo, is developing into a juristic science, and the day is dawning when a positive external law of nations, enforced by a great modern amphictyonic council, shall be of universal operation. It is the herald of perpetual peace.

Otto Erickson.

## WHAT IS NEGLIGENCE?

### *The Turntable Doctrine.*

In previous articles it has been suggested that negligence, whether on the part of the defendant or on the part of the plaintiff, may be described as "action or non-action accompanied by knowledge of the consequences thereof." See Law Notes, vol. 20, p. 185. And it has been stated that liability is to be determined with a view to the comparative knowledge of the parties. If the defendant acted with superior knowledge of the peril, a recovery should be allowed; but if it appears that the plaintiff's appreciation of the danger was greater than or equal to that of the defendant, then a recovery should be denied. This is the true test of liability in all negligence cases (and others as well). The judges are accustomed to appeal to the great variety of legal "doctrines," for the purpose of finding adequate reasons for their conclusions; but the real ground of decision is, as stated, the parties' comparative knowledge of the danger from which injury resulted. No class of cases, perhaps, illustrates this better than that wherein the Turntable Doctrine is denied or affirmed.

It has been observed by a commentator: "The grounds upon which railroads have been held liable in the turntable cases may be summed up as: 1. That the turntable is easily accessible to children. 2. That it is peculiarly attractive to children, and calculated to entice them. 3. That, when set in motion, it is a source of latent danger. 4. That it was left unguarded and unfastened, although, at slight expense, it could have been guarded and fastened. 5. That the company knew that children were accustomed to play there, and ought to have known the danger to them." Note: 19 L. R. A. (N. S.) 1115. And this appears to be an accurate summary of the opinions. Now, then, let us see how the principle of comparative knowledge is to be discovered. It is not difficult. In the fifth division of the summary it is stated that the railroad must have *known* of the danger to the children, and in the third it is noted that the danger must have been latent, which means that it was *not known* to the injured child. And so, by transposing this language only slightly, it appears that the railroad is to be held liable when the danger from the turntable was known to it and not known to the injured child. It is the defendant's superior knowledge of the danger that furnished the ground for recovery. But what of elements numbered one, two, and four, in the summary above set forth? One and two bear upon the fact of the defendant's knowledge of the peril; that is, if the turntable was attractive to children and accessible to them, the defendant company is chargeable with knowledge that they would make use of it;—knowledge of the peril is imputed to the defendant. As for four: this expresses an affirmative duty that follows upon knowledge. Knowing of the peril the defendant must take precautions to prevent an injury resulting therefrom. See Law Notes, vol. 21, p. 85,

### *The Doctrine of Last Clear Chance.*

A few decisions will serve to illustrate the point. In a recent case the Turntable Doctrine was presented to the West Virginia court—that court never having passed upon it previously—and it was held, according to the headnote by Mr. Justice Poffenbarger, that "the law imposes no liability upon a railroad company for maintaining, upon its private property, an unlocked, unfastened, and unguarded turntable, in favor of the children, though located in a thickly settled community, near a public street, on ground on which children are wont to congregate for play." *Conrad* v. *Baltimore, etc., R. Co.,* 64 W. Va. 176, 61 S. E. 44, 16 L. R. A. (N. S.) 1129. Here was what purports to be a flat denial of the doctrine in question; but in examining the opinion we find that the plaintiff "was a bright, intelligent little fellow about twelve years old, had worked in a glass factory for a considerable period of time before he was hurt, knew the danger incident to the operation of the turntable." Was not this the real reason for denying a recovery? Let anyone reflect a little and examine some of the cases; he will agree that the plaintiff's knowledge of the danger barred him of recovery. This knowledge of the danger, by the way, is what is termed contributory negligence. The plaintiff was guilty of contributory negligence.

Similarly, the court denied a right of recovery in the case of *Twist* v. *Winona, etc., R. Co.,* 39 Minn. 164, 39 N. W. 402, 12 A. S. R. 626, it appearing that the child, although only ten years of age, had been warned by his father that the turntable was dangerous, "and he himself knew that it was dangerous." The Virginia decision of *Walker* v. *Potomac, etc., R. Co.,* 105 Va. 226, 8 Ann. Cas. 862, 53 S. E. 113, 15 Am. St. Rep. 871, 4 L. R. A. (N. S.) 80, is of similar import. Here the Turntable Doctrine was denied; but it appeared that the injured child was twelve years of age, and that the turntable was so far removed from dwellings as to be safe from children of tender years. In other words the railroad company had taken all reasonable precautions to

prevent injury to such children as could not know and appreciate the danger. In a recent Ohio case the Turntable Doctrine was disapproved; but it appeared that the turntable in question was not accessible to children generally, and that the defendant company had no knowledge of the injured child's presence on its property. *Wheeling, etc., R. Co.* v. *Harvey*, 77 Ohio St. 235, 11 Ann. Cas. 981, 83 N. E. 66, 122 Am. St. Rep. 503, 19 L. R. A. (N. S.) 1136.

And so in the decisions approving the doctrine and justifying a recovery thereby, we find the courts relying upon the fact that the defendant knew or ought to have known of the injured child's peril. For example, it is said that the safety of children "must not be imperiled by any act of a person which he has reasonable ground to expect may probably do so." *Kelly* v. *Southern Wisconsin R. Co.*, 152 Wis. 328, 140 N. W. 60, 44 L. R. A. (N. S.) 487. Where the injury resulted from an explosion of carbide gas the court said: "It is quite obvious that the defendant was guilty of negligence, if the allegations of the complaint be true, in leaving large quantities of carbide exposed and unguarded, for it is clear from such allegations that it ought, in the exercise of ordinary care, to have anticipated that children of tender years were liable to be injured thereby, especially so in view of its actual knowledge in the premises." *Juntti* v. *Oliver Iron Min. Co.*, 119 Minn. 518, 138 N. W. 673, 42 L. R. A. (N. S.) 840. And in another of the recent cases it was held, according to a headnote, that "the owner of a mill who operates in connection therewith, but outside the walls, near a public street, an unguarded refuse carrier to which children are accustomed to resort to play and gather wood, will be liable in damages for injury to a child caught in the apparatus, if the jury determine that the machinery was dangerous and known to be such because attractive to and known to be frequented by children, and the owner was negligent in leaving it uncovered and unprotected." *Nashville Lumber Co.*, v. Busbee, 100 Ark. 76, 139 S. W. 301, 38 L. R. A. (N. S.) 754.

An excellent and very plain illustration of the truth for which we contend is furnished by the cases of injury to children from fires. Fire is dangerous, and everyone knows it to be dangerous—even little children—and for this reason it is proper to deny a recovery for injuries sustained by a child therefrom. But rarely if ever will one find a case which proceeds upon this reasoning. Instead, we find lengthy philosophizing upon what constitutes trespass, license to enter upon property, "implied invitation," dangerous instrumentalities, and many of the other supposed factors of the Turntable Doctrine. An illustration of this is found in the case of *Paolino* v. *McKendall*, 24 R. I. 432, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133. Here the opinion extends to a minute discussion of the Turntable Doctrine, but concludes very practically as follows: "In our view of the law the question in this case is not whether a fire is or is not attractive to a child, but whether on the undisputed facts alleged in this case, for the demurrer admits them to be true, there was any duty on the owner or occupier of the land on which this fire was located to guard the child against it." The A. S. R. headnoter, however, got at the real point of decisions when he concluded from the opinion that "although an owner or occupant of land has knowledge that children of tender years are in the habit of going thereon to play, he is under no duty or obligation to guard them from injury caused by fire set by him to consume waste materials." Again, where the injuries were sustained by the plaintiff stepping into hot ashes on a dumping ground, the court said: "He was an intelligent, active lad of twelve years, who had been warned by his father of the danger of going into the excavation. He must be taken as voluntarily assuming the risk of injury in going down the dump." *Butz* v. *Cavanaugh*, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504.

A case very well illustrating the proposition that liability is to be determined with a view to the comparative knowledge of the parties as to the perilous instrumentality that caused the injury is *Penso* v. *McCormick*, 125 Ind. 116, 25 N. E. 156, 21 Am. St. Rep. 211, 9 L. R. A. 313. The injury there complained of was caused by the child stepping in hot ashes. The court expressed its conclusions as follows: "We do not hold or intend to hold that the appellees would be liable for the ordinary use of their lot in piling hot ashes taken from their mill upon it in the usual way, or that persons are liable ordinarily for mere negligence in the use of their own property as against trespassers. But the allegations of the complaint show a wanton disregard of the rights and safety of others. It shows that the appellees had, by their knowledge and acquiescence, given license to children of tender years to use their uninclosed lot as a playground, and, without any warning to them or others, they constructed a pitfall in the ground where such children were accustomed to play, which they filled with burning embers, and which gave forth no signs of its condition or the danger in stepping upon its covering, and while in this condition the plaintiff, a child of tender years, entered upon it, as he was accustomed to do, without any knowledge of its changed condition, and was severely burned and injured, and the appellees are liable under such circumstances to respond in damages."

Another case that plainly discloses how the courts have mistaken the real ground of decision is *Savannah, etc., R. Co.* v. *Beavers*, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314. Therein it appeared that the plaintiff's child fell into an excavation made by the defendant railroad company and was drowned. The court reviewed the Turntable Doctrine at great length, citing and comparing many authorities, and concluded that "one who makes an excavation upon his land is not bound to so guard it as to prevent injury to children who come upon it without his invitation, express or implied, but who are induced to do so merely by the alluring attractiveness of the excavation and its surroundings." But in reciting the facts of the case the court said: "All of these boys had been playing with the frogs in the excavation for several days prior to the accident, but there was no evidence that any of the company's officials had knowledge of this fact. A day or two before the accident a man passing by warned these boys to get away from the excavation or they would get hurt." And here plainly enough is to be found the real reason for denying a recovery. The child knew of the peril and the defendant did not know of it.

In conclusion it may be said that any court or judge who denies all right of recovery for injuries sustained by

a young child merely on the score that the infant at the time was a trespasser, risks doing injustice. The Turntable Doctrine should be discarded, and the cases should be allowed to proceed according to the real logic of negligence and contributory negligence. Discussions concerning the technicalities of trespass, "implied invitation," and the old reliable "Sic utere tuo ut alienum non lædas," should give place to a more careful weighing of the evidence disclosing the character and location of the offending instrumentality, precautions that might have been taken by the defendant, and the age and intelligence of the injured child.

Berkeley Davids.

Washington, D. C.

## Cases of Interest

Action by Domestic Corporation Composed of Alien Enemies.—In Daimler Co. *v.* Continental Tyre, etc., Co., [1916] 2 A. C. 307, reported and annotated in Ann. Cas. 1917C 170, it appeared that an action was instituted by a domestic corporation whose membership was almost entirely composed of alien enemies domiciled in a hostile country, and who alone could authorize the institution of an action by the corporation. In holding that under such circumstances no action could be maintained by the corporation, the court, *per* Earl of Halsbury, said: "I confess it seems to me that the question becomes very plain, when one applies the language of the law to the condition of things when war is declared, between the German who is in the character of shareholder and in control of the company. They can neither meet here, nor can they authorize any agent to meet on any company business. They can neither trade with us nor can any British subject trade with them. Nor can they comply with the provisions for the government of the company which they were bound by their incorporated character to observe."

Toll Road Franchise as Authorizing Exacting of Tolls on Automobiles.—The construction of a toll road franchise granted in 1814 was an issue in Peru Turnpike Co. *v.* Town of Peru (Vt.), 100 Atl. 679, in a proceeding to condemn the location of the toll road. The franchise provided for a toll of fifty cents for a "four-wheeled pleasure carriage drawn by two beasts," and when automobiles came into use the proprietor of the franchise made the same charge for automobiles. In determining the value of the franchise it was sought to have considered the amount received from automobiles, but the court refused the request on the ground that the franchise was not broad enough to cover automobiles, and it was further held that the fact that tolls for automobiles were charged and received did not establish a prescriptive right to charge.

Solicitation of Business by Attorney as Forfeiture of Right to Compensation Therefor.—In Chreste *v.* Louisville R. Co., 167 Ky. 75, 180 S. W. 49, reported and annoted in Ann. Cas. 1917C 867, it appeared that an attorney intervened in a suit to recover damages for personal injuries, to enforce a statutory lien for fees. There was evidence to show that the contract of the attorney with the injured plaintiff was procured through the solicitation of the former's agent. In discussing the validity of a contract so obtained the court said: "Considering the difficulty of fixing the dividing line between what is proper and improper solicitation, the uncertainty that the doctrine would introduce into all contracts between attorneys and their clients the fact that solicitation is not condemned at common law or denounced by our Constitution or statutes, and the further fact that it is difficult to perceive upon what theory it can be said to be clearly injurious to the public good, we conclude that mere solicitation on the part of an attorney, unaccompanied by fraud, misrepresentation, undue influence or imposition of some kind, or other circumstances sufficient to invalidate the contract, is not of itself sufficient to render a contract between an attorney and client void on the ground that it is contrary to public policy."

Fall from Scaffold by Epileptic as Accident Arising out of Employment.—That a person injured by a fall from a scaffold while at work, due to an epileptic fit, was not injured by an accident arising out of his employment so as to make his employer liable under a state Workmen's Compensation Act was the holding in Gorder v. Packard Motorcar Co., (Mich.) 162 N. W. 107. The case was decided on the authority of two English cases, namely, Butler *v.* Burton-on-Trent Union, (1912) 5 B. W. C. C. 355, and Nash *v. The Rangatira,* (1914) 3 K. B. 978. The court commenting on these two cases said: "In the Butler Case the deceased was master of a workhouse. While sitting at the top of some stairs leading up to his private rooms he was seized with a fit of coughing which made him giddy. He fell down the stairs, receiving an injury resulting in death. He was at the time suffering from tubercular trouble. It was held that the injury did not arise out of his employment, and that there was no liability, although it arose while deceased was in the course of the employment; that both must concur. The Nash Case arose under the following circumstances: Deceased went on shore with leave while the *Rangatira* was lying by the quay. He returned intoxicated about 11:15 P.M. and attempted to mount the gangway, which was properly constructed, and when about halfway up let go with one hand, and, swinging around, fell over the other rope on to the quay, receiving injuries from which he died the next day. It was held that the man had returned and was in the sphere or ambit of his employment, and therefore in the course of his employment, but that the accident was caused by his condition, and hence the injury did not arise out of his employment."

State Regulation of Manufacture or Sale of Bedding.—In People *v.* Werner, 271 Ill. 74, 110 N. E. 870, reported and annotated in Ann. Cas. 1917C 1065, it appeared that a state statute prohibited the use of cotton or other material made secondhand by use about the person, in the making of mattresses, quilts, or bed comforts, and forbid the sale of any such mattresses, etc., so made. It did not, however, prohibit the use of secondhand material in the making of bedding for personal use, provided such material was first sterilized. The statute was held to be void, since, while proper regulations might be made to protect the health of the public, this did not require the absolute prohibition of a lawful business which might be so conducted as not to be a menace, the court saying: "The act does not attempt to prohibit the use of secondhand mattresses, but does prevent their ever again being used in the manufacture of other mattresses which are to be sold. To prohibit absolutely the use of such material in the manufacture of mattresses for sale when not inherently dangerous and when it may be rendered safe by reasonable regulation is an invasion of personal and property rights within the meaning of the federal and state constitutions. By this act the state has deprived the citizen of the lawful use of his property in a manner not injurious or dangerous to others."

Validity of Prohibited Extraterritorial Marriages.—The rule that a marriage valid where solemnized is valid everywhere has its exceptions, and an illustration of one of the exceptions to the rule is Hall *v.* Industrial Commission, (Wis.) 162 N. W. 312. The facts showed that the plaintiff obtained a decree from her husband in Illinois where she was a resident, the decree reciting that neither party should marry again within the time forbidden by statute, that time being one year. But within a year she married a resident of Illinois in the state of Indiana. They returned to Illinois, lived there a short time, and then went to live in Wisconsin. Wisconsin had a statute providing that where a resident who was prohibited from contracting marriage under the laws of the state went into another state and married, such marriage should be deemed null and void for all purposes in Wisconsin. A similar statute was in existence in Illinois. By virtue of this statute and another statute according to decrees of divorce of other states full faith and credit, and also by virtue of the full faith and credit clause of the United States Constitution, it was held that the marriage of the plaintiff contracted in Indiana was invalid. Vinje, J., for the court said: "The statute of Illinois with its judicial construction must be deemed imported into plaintiff's divorce decree, and since such statute and construction are substantially the same as ours, and since they declare a public policy similar to our own, no good reason is perceived why this court should not take cognizance of plaintiff's evasion of the laws of our sister state and apply the same rule to their infraction that we would apply to a violation of our own like laws. The Industrial Commission found that plaintiff went to Indiana to marry in order to evade the disability created by the Illinois decree, and such conclusion finds support in the stipulated facts. The Illinois court had jurisdiction of plaintiff's person, and it was competent for it to fix and declare her status. Such status so declared, being founded upon grounds of sound public policy, should be respected by at least all sister states having the same or similar laws. Reasonable restrictions against speedy remarriage of divorced parties are becoming more common in the statutes of our states, and their intentional violation should find no sanction in states having similar restrictions. Only by each state enforcing public policies common to it and other states can our divorce laws be freed from the odium of being willfully violated with impunity. Our states do not stand in the same relation to each other that foreign countries do."

Right of Conditional Vendor to Fittings Added to Automobile.—In Blackwood Tire, etc., Co. *v.* Auto Storage Co., 133 Tenn. 515, 182 S. W. 576, reported and annotated in Ann. Cas. 1917C 1168, it appeared that the conditional purchaser of an automobile, title to which had been retained by the seller, fitted it with tire casings. The seller, on nonpayment, retook the machine, and in holding that the title to the casings passed to the seller, the court said: "In the case before the court it is to be noted that the plaintiff in error sold the tire casings outright, to C., and he permitted these casings to go with the machine into the hands of the defendant in error without objection, and in like manner permitted the sale of the machine with the tire casings attached, and never attempted to retake these casings until later, and then in furtherance of the effort of the plaintiff in error to regain them, and that for this purpose he endeavored to make sale of them at that time to the plaintiff in error. We think it must be laid down as a general principle that the mortgagor, in making repairs on property which he has mortgaged, must be held, in the absence of some distinct evidence to the contrary, to have intended such repairs as a fixed improvement to such property, since the amelioration inures not only to the benefit of the mortgagee, but to his own benefit as well, in the enhancement of the value of his property, to the end that it may go further toward relieving him of the mortgage debt in case sale should be made."

Constitutionality of Oregon Hours of Labor Act.—The latest decision of the United States Supreme Court on the validity of statutes regulating hours of labor will be found in Bunting *v.* Oregon, 37 Sup. Ct. Reporter 435. The case was begun by indictment in a state court in Oregon and the statute under consideration was enacted by the legislature of that state. Section 2 provided as follows: "No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; provided, however, employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one-half of the regular wage." (Laws 1913, chap. 102, p. 169.) A violation of the act was made a misdemeanor, and in pursuance of this provision the indictment was found. It charged a violation of the Act by defendant, Bunting, by employing and causing to work in a flour mill one Hammersly for thirteen hours in one day, Hammersly not being within the excepted conditions, and not being paid the rate prescribed for overtime. A demurrer was filed to the indictment, alleging against its sufficiency that the law upon which it was based was invalid because it violated the 14th Amendment of the Constitution of the United States and the Constitution of Oregon. The demurrer was overruled; and the defendant, after arraignment, plea of not guilty, and trial, was found guilty. A motion in arrest of judgment was denied and he was fined $50. The judgment was affirmed by the supreme court of the state. The chief justice of the court then allowed a writ of error to the United States Supreme Court, where the validity of the statute was upheld and judgment affirmed, but by a divided court, there being three dissenting judges.

Civil Liability of State Governor for Official Act.—In Hatfield *v.* Graham, 73 W. Va. 759, 81 S. E. 533, reported and annotated in Ann. Cas. 1917C 1, it appeared that a state of war, insurrection, and riot, had been recognized by the Governor of West Virginia as existing in certain districts of that state. It further appeared that acting by virtue of his official position the governor had temporarily suppressed a newspaper, having a circulation in the martial zone and containing articles which he had reason to believe would encourage a continuation of the disorder. An action for damages was brought against him by the publishers, and in awarding a writ to prohibit the lower court from entertaining the action the court said: "The governor of the State cannot be held to answer in the courts in a civil action for damages resulting from the execution of his lawful orders or warrants issued in good faith in discharge of his official duties. The Constitution and laws of the state vest in him certain powers and duties, and he is necessarily clothed with the right to determine what his duties are in any emergency; and, so long as he acts within the limits of his constitutional powers and privileges, his official conduct is not subject to review in any other manner than that provided by the Constitution which created his high office. . . . If the courts could, while the governor is in office, review his official acts and proclamations and pronounce them illegal, then the judiciary, and not the governor, would be the chief executive power in the state."

APPLICATION OF LAW OF THE ROAD TO ONE USING HIGHWAY FOR PLAY.—A case apparently of first impression is that of Terrill *v.* Virginia Brewing Co., 130 Minn. 46, 153 N. W. 136, reported and annotated in Ann. Cas. 1917C 453. It there appeared that a boy was killed while coasting down hill on a city street by coming in collision with a sleigh which was coming up hill on the left-hand side of the street. It was contended that a statute providing that all vehicles should keep to the right of the center of the street had no application. In applying the law of the road and sustaining a judgment for the plaintiff the court said: "It is urged that this law applies only to streets in the very restricted sense of paved and curbed ways in a city or village, while the street in question was not paved or curbed, and not 'plated.' We find no merit in this argument. The law applies generally to all streets within cities or villages. . . . The point that there is no means of determining with precision where the center of the street was has no force in determining the applicability of the statute, though it might have weight were there any question here as to what side of the center defendant's team was on. We think it is plain that the statute applied to this street, and that defendant's violation of it was at least evidence of negligence. No reason appears for the driver being on the left side of the street; there were no obstructions to his taking the other side, and he knew that the boys used the hill for coasting. The trial court correctly submitted this question to the jury, and we cannot disturb their findings."

INJURY CAUSED BY WAR AS ARISING OUT OF EMPLOYMENT WITHIN WORKMEN'S COMPENSATION ACT.—Whether an injury to a civilian employee due to the existence of a state of war was an injury arising out of and in the course of employment within the meaning of the English Workmen's Compensation Act was presented for decision in Risdale *v.* Kilmamock [1915] 1 K. B. 503, reported and annotated in Ann. Cas. 1917C 757. It there appeared that the engineer on a steam trawler was injured as a result of the sinking of the trawler by an enemy mine. It was shown that the trawler entered the mine fields in disregard of warnings, and that the plaintiff had just come off duty and was on deck when the explosion occurred. In allowing the claim of the plaintiff for compensation, Swinfen Eady, L. J., said: "In my opinion the engineer was doing his duty and acting in and in the course of his employment. The navigation of the ship, or the course which the ship was to steer, was not in any way under his control. In all probability he did not know what the right or proper course to steer was. It is not suggested that anybody had given him information with regard to the existence of the mine field. His duty, as engineer on board that ship, was to comply with the instructions he received from bridge or deck, whether they were from skipper or mate or whoever was in charge of the ship at the time. In my opinion when this unfortunate accident happened the engineer was clearly acting in and in the course of his employment, and the accident arose out of and in the course of that employment."

RIGHT OF INFANT UNLAWFULLY ENLISTED TO DISCHARGE FROM MILITARY SERVICE.—Section 27 of the National Defense Act of June 3, 1916 (Fed. Stat. Ann. Pamph. Supp. No. 7, p. 63), provides that no person under the age of eighteen years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that he has such parents or guardians entitled to his custody or control. The parents of an infant under the age of eighteen who had enlisted filed a petition for a writ of habeas corpus for his release. In the return to the writ it was alleged that the infant was being held by the military authorities to answer the charge of fraudulent enlistment and receiving allowances and rations. In denying the writ and discussing the right of the parent to the discharge of his son the court in Hoskins *v.* Dickerson, 239 Fed. 275, reported and annotated in Ann. Cas. 1917C 776, said: "When the petition for the writ of habeas corpus was filed, the petitioner's son was in the custody of the military authorities. A court-martial is the proper tribunal to try him for a military offense charged to have been committed by him while his enlistment was effective to the extent of subjecting him to military control and discipline. The election by the father, evidenced by the writ of habeas corpus, to avoid his son's enlistment terminated the right of the military authorities to detain the latter under the enlistment. But it did not terminate the right of such authorities to continue their custody of the minor for the time reasonably required for the exercise of the military jurisdiction brought into play by duly made charges of the commission of military offenses by the minor while he was a soldier."

STATE REGULATION OF PRACTICE OF NURSING.—The right of a state to regulate the practice of nursing was presented for consideration in State *v.* District Court, 50 Mont. 289, 146 Pac. 743, reported and annotated in Ann. Cas. 1917C 164, wherein was involved a Montana statute providing in part that "Any person who makes application to the board for examination . . . who shall not pass said examination . . . may appeal to the Montana State Association of Graduate Nurses . . . and shall abide by the majority vote of said association after a full hearing thereon." One W. having applied for examination, was examined by the state board and notified that owing to her failure to pass the board would not recommend her to the governor for registration, whereupon she appealed to the State Association of Graduate Nurses under the provisions of the Act referred to, and the decision of the examining board was sustained. In upholding the constitutionality of the statute involved the court said: "Now, whether there be or be not a natural right to pursue the business of nursing, there certainly is not any such right to a certificate of qualification from the state or to pretend that such certificate has been issued when it has not; and the right of the state to grant or refuse such certificate upon its own terms cannot be open to debate. Moreover, due process of law is not necessarily judicial process (Cunningham *v.* Northwestern Imp. Co., 44 Mont. 180, 119 Pac. 554), and, even in those cases where the practice of a profession which is potent for harm as well as good, is positively forbidden unless the practitioner shall have established his qualification by examination before a board, there is no arbitrary deprivation of any right, for the state may require such qualifications as tend in its judgment to insure against the effect of ignorance, incapacity, deception or fraud, and may enforce such requirement by any proceedings adapted to the nature of the case. . . . In the present instance, the position of the state is much stronger, for no right is denied. The aim of the Act is, not to prohibit the practice of nursing, either gratuitously or for hire, but to designate the persons for whose qualifications the state is willing to stand sponsor, and to forbid persons from claiming such sponsorship who are not entitled to it. The matter is wholly administrative, and the process of administration may be committed to any agency the legislature may choose to select, with or without direct appeal to the courts or elsewhere. Since this is so, no constitutional question can possibly arise merely because a second agency is prescribed to sit in judgment upon the first, when asked to do so by a rejected applicant."

# News of the Profession

The Wyoming Bar Association held its annual convention at Kemmerer, Wyo., on August 1.

Named County Judge.—A. C. Brooks of Harrison has been appointed county and probate judge of Boone county, Arkansas, to succeed Claude B. Crumpler, resigned.

Made Assistant Attorney General of Virginia.—J. D. Hank of Norfolk has been appointed assistant attorney general of Virginia to succeed Leslie C. Garnett, resigned.

Resignation of Florida Judge.—Justice T. M. Shackleford who has served as a member of the Florida Supreme Court for the past fifteen years resigned from the bench on September 1.

Appointed Common Pleas Judge.—Isaac T. Siddel of Ravenna has been appointed by Governor Cox of Ohio to the Common Pleas bench to fill the unexpired term of the late Judge G. F. Robinson.

Florida Judicial Appointment.—Thomas F. West, Attorney General of Florida, has been appointed to the bench of the Supreme Court of that state to succeed Justice T. M. Shackleford, resigned.

Named Superior Court Judge.—Governor Goodrich of Indiana has appointed William T. Gleason of Terre Haute as judge of the Vigo Superior Court to succeed Judge Fred W. Beal, resigned.

Appointed to Municipal Bench.—R. B. Hart of Cumberland has been appointed by Governor Philipp of Wisconsin to the bench of the third Municipal Court of Barron county, succeeding Judge A. F. Wright, resigned.

Death of Former Federal Judge.—Adolphus B. Capron, 84 years of age, former justice of the United States District Court and one of the oldest members of the Denver bar, died at that city on August 18.

Municipal Court Appointment in New York City.—Mayor Mitchell of New York city has appointed John Boyle, Jr., a judge of the Municipal Court in Bronx county to fill the place created by the last legislature.

Noted Massachusetts Lawyer Dead.—Dana Malone, one of the best known lawyers of Massachusetts and for three years attorney general of that state, died at Greenfield, Mass., on August 13, aged 60 years.

New Federal Judge in Georgia.—Judge Beverly D. Evans has resigned from the bench of the Georgia Supreme Court to accept the appointment of United States judge for the southern district of Georgia.

Well-known New York Lawyer Dead.—George L. Rives, formerly assistant secretary of state and at one time corporation counsel of New York city, died at Newport, R. I., on August 18, aged 68 years.

Aged New Hampshire Lawyer Dead.—Samuel C. Eastman, formerly president of the New Hampshire Bar Association, died at Concord, N. H., on August 31. He was 80 years old and had practiced law in Concord since 1869.

Death of Kansas Jurist.—J. Jay Buck, judge advocate general on the staff of General L. H. Rosseau and General R. W. Johnson during the Civil War, died at Emporia, Kan., on September 6. He was the oldest past grand master of Masons in Kansas.

Death of New York Judge.—Justice William J. Carr of the New York Supreme Court died at Good Ground, L. I., on August 5, aged 55 years. Justice Carr was appointed to the Supreme Court bench in 1907, and in 1911 was elevated to the Appellate Division, Second Department.

Changes among Federal Attorneys.—M. A. Thomas, chief deputy United States attorney at San Francisco, has resigned. Redmond Cole, Mayor of Pawnee, Okla., has been appointed assistant United States attorney for the western district of Oklahoma, with headquarters at Oklahoma City.

Appointments to Bench in Maryland.—Joseph L. Bailey of Wicomico county and William Johnson of Worcester county have been appointed associate judges of the First Judicial Circuit of Maryland to fill the places made vacant by the death of Judges Robley D. Jones and Henry L. D. Stanford.

Appointed Peacemaker in Labor Troubles.—Chief Justice J. Harry Covington of the Supreme Court of the District of Columbia has been appointed by the President to investigate the labor troubles in the mines of Montana, Arizona and other western states in an affort to adjust the differences between the operators and the workers.

Judicial Appointments in California.—Governor Stephens of California has recently made the following judicial appointments: Joseph S. Koford and James G. Quinn as superior judges of Alameda county; Ruff Avery and L. H. Valentine as superior judges of Los Angeles county; Spencer M. Marsh as superior judge of San Diego county.

Changes among Georgia Judiciary.—Judge Walter F. George of the Court of Appeals of Georgia has been appointed a member of the Supreme Court of that state to succeed Justice Evans, resigned. Judge Frank Harwell of the city court of La Grange has been appointed to succeed Judge George on the Court of Appeals bench, and E. T. Moon has been named to succeed Judge Harwell.

Assistant Attorney General of United States Resigns.—E. Marvin Underwood of Atlanta, Ga., who for the last several years has been assistant United States attorney general at Washington, has resigned that post to accept the position of general counsel of the Seaboard Air Line railroad at Norfolk. Mr. Underwood has been succeeded at Washington by W. L. Frierson of Chattanooga.

Death of Former Senator Kern.—John W. Kern, former United States Senator from Indiana, died at Asheville, N. Car., on August 17, aged 68 years. Mr. Kern was known as one of the ablest criminal lawyers in Indiana. He served as reporter of the Indiana Supreme Court from 1882 to 1886, and was the running mate of William Jennings Bryan for Vice-President of the United States in 1908.

Minnesota State Bar Association.—At its recent annual convention held in Minneapolis, Minn., the Minnesota State Bar Association elected the following officers: President—George W. Buffington of Minneapolis; vice-president—L. L. Brown of Winona; secretary—Chester L. Caldwell of St. Paul; treasurer—John M. Bradford of St. Paul; librarian—Elias J. Lien of St. Paul.

Tennessee Bar Association.—The annual meeting of the Tennesse Bar Association was held at Westmoreland, Tenn., on August 30 and 31. The official program contained the following addresses: "What the East Can Learn from the West," by G. S. Ramsey of Oklahoma; "The Appellate Court Procedure," by Norman J. Farrell, Jr., of Nashville; "The Tennessee Historical Society," by John H. Dewitt of Nashville.

Brussels Lawyers Honor Burgomaster Max.—Brussels lawyers have unanimously elected Adolphe Max, the heroic burgomaster of Brussels, imprisoned by Germans, president of the bar association. Burgomaster Max was arrested at Brussels Sept. 28, 1914, for his "irreconcilable attitude," according to an announcement of the German military governor. After being imprisoned at various places in Germany he was finally interned at Glatz. Paris papers some time ago asked President Wilson, the Pope or the King of Spain to intervene in his behalf.

Widely Known Mississippi Lawyer Dead.—Edward Mayes, one of the best known law authorities of the South, died at Jackson, Miss., on August 9, aged 71 years. Judge Mayes was a Confederate veteran, entering the service at eighteen years of age and serving the entire four years of the war. He became professor in the law department of the State University at Oxford and afterwards chancellor of that institution. It was while serving as such that he became known as a law writer, perhaps his best known work being "Limbs of the Law."

North Dakota Bar Association.—The fourteenth annual convention of the North Dakota Bar Association was held at Dickinson, N. Dak., on August 16 and 17. Addresses were delivered by Justice W. D. Evans of the Iowa Supreme Court on "A Week in English Courts," and by John E. Greene of Minot, a former president of the association, on "Responsible Government." The following officers were elected: President—F. T. Cuthbert of Devils Lake; vice president—Tobias D. Casey of Dickinson; secretary and treasurer—Oscar J. Seiler of Jamestown. The association chose Bismarck as the place for the next meeting.

Montana Bar Association.—The annual meeting of the Montana Bar Association was held at Butte, Mont., on August 17 and 18. The president's address was delivered by Judge Lew L. Callaway of Great Falls. Addresses were also delivered by A. N. Whitlock, dean of Montana University Law Department, on the "State Board of Law Examiners"; by J. A. Walsh of Helena, on "Requirements for Lawyers"; and by E. B. Howell of Butte, on "Wealth and Wages." Other speakers were Charles R. Leonard of Butte, District Judge George B. Winston of Anaconda, F. B. Reynolds of Billings, Sidney Sanner, Associate Justice of the Supreme Court of Montana, and Roy E. Ayers of Lewistown. Officers for the ensuing year were elected as follows: President—E. B. Howell of Butte; vice-presidents—first district, C. E. Pew; second district, Fred J. Furman; third district, Edward Scharnikow; fourth district, William Wayne; fifth district, D. P. Beckett; sixth district, F. L. Gibson; seventh district, C. H. Loud; eighth district, H. R. Eickmeyer; ninth district, George G. Patton; tenth district, O. W. Beldon; eleventh district, J E. Erickson; twelfth district, L. V. Beaulieu; secretary and treasurer—V. L. McCarthy of Helena.

American Bar Association.—As was announced in September Law Notes, the American Bar Association met in annual convention at Saratoga Springs, N. Y., on September 4, 5, and 6. Among the features of the program for the meeting were the following: Address of welcome, by Edgar T. Brackett of Saratoga Springs; president's address, on "Private Rights and Government Control," by George Sutherland of Utah; address on "The Interstate Commerce Clause of the Constitution of the United States," by United States Senator Thomas W. Hardwick of Georgia; address on "War Powers under the Constitution," by Charles E. Hughes of New York; address by William H. Burges of Illinois; address on "Prussian Law as Applied in Belgium," by Maître Gaston de Leval of the Bar of Brussels; address on "The Representative Idea and War," by Robert McNutt McElroy of New Jersey. Resolutions pledging the loyalty of the Association to the government during the present war were presented at the opening session by Elihu Root, on behalf of the executive committee, and were unanimously adopted. The following officers were elected: President—Walter G. Smith, Philadelphia, Pa.; secretary—George Whitelock, Baltimore, Md.; treasurer—Frederick E. Wadhams, Albany, N. Y.; executive committee—Charles N. Potter, Cheyenne, Wyo.; John Lowell, Boston, Mass.; Charles Bloodsmith, Topeka, Kan.; Ashley Cockrill, Little Rock, Ark.; George T. Page, Peoria, Ill.; T. A. Hammond, Atlanta, Ga.; U. G. Cherry, Sioux Falls, S. D.; Charles T. Terry, New York. In connection with the meeting of the Bar Association proper, meetings of the following subsidiary and allied bodies were held: *Conference of Bar Association Delegates,* with address by Elihu Root of New York; *Section of Legal Education,* with address by Hampton L. Carson of Pennsylvania; *Comparative Law Bureau,* with address by Simeon E. Baldwin of Connecticut on "The Growth of Law in the Last Year"; *Section of Patent, Trademark and Copyright Law,* with addresses by Robert H. Parkinson of Illinois and John P. Bartlett of New York; *Judicial Section,* with address by Prof. Boris Bakmetieff, Russian Ambassador to the United States, on "The Relation of the Judiciary to the March of Democracy"; *National Conference of Commissioners on Uniform State Laws; American Institute of Criminal Law and Criminology,* with addresses by John P. Briscoe of Maryland, and by Thomas Mott Osborne of New York, on "Common Sense in Prison Management"; and *Section of American Society of Military Law.*

## English Notes*

Soldiers as Candidates.—Mr. Macpherson, as Under-Secretary of State for War, in reply to a question on July 19, said that, as far as he was able to ascertain, any non-commissioned officer or private could offer himself as a candidate for election to the House of Commons. The statement, which somewhat startles the imagination, is quite in accordance with the King's Regulations for the army, in which no difference is made in this respect between an officer and private soldier. Regulation 451, to which Mr. Macpherson referred in his reply, is as follows: "An officer or soldier is forbidden to institute or take part in any meetings, demonstrations, or processions for party or political purposes in barracks, quarters, camps, or their vicinity. Under no circumstances whatever will he attend such meetings, wherever held, in uniform." The non-commissioned officer or soldier has, it seems, exactly the same right to be a Parliamentary candidate as a commissioned officer. There is, so far as we are aware, no incident of a private soldier while still in the army being returned for the House of Commons, although several persons, notably Mr. Cobbett and Mr. Bradlaugh, before they entered

*With credit to English legal periodicals.

the House of Commons, had served as soldiers in the ranks. A supplementary question addressed to Mr. Macpherson was not answered by him, but elicited loud cries in the affirmative from several members: "Has the soldier a right to attend a political meeting in uniform?" The presence of soldiers in uniform in the House of Commons, long before the present war, has been sanctioned. On August 3, 1885, notice was taken that two soldiers in uniform lately returned from the Crimea had been refused admission to the Strangers' Gallery. The Speaker stated that there was no rule for their exclusion, and soldiers in uniform, but unarmed, have since been freely admitted.

Moneylenders and Public Policy.—It is fortunate sometimes that there is such a thing as public policy. No doubt contracts in restraint of trade, or the like, are valid if they fulfil two conditions—namely, (1) the restraint must be reasonable in the interests of the contracting parties, and (2) it must be reasonable in the interests of the public. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favor it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public (see judgment of Lord Macnaghten in Nordenfelt *v.* Maxim-Nordenfelt Company, 71 L. T. Rep. 489; (1894) A. C. 535); and to be reasonable in the interests of the parties it must afford no more than adequate protection to the party in whose favor it is imposed (see the judgment of Lord Parker of Waddington in Herbert Morris Limited *v.* Saxelby, 114 L. T. Rep. 624; (1916) 1 A. C. 628). In the recent case of Harwood *v.* Millar's Timber and Trading Company Limited (115 L. T. Rep. 805) a clerk, or person, in the employ of a timber company mortgaged a life policy, and all his salary or wages, due or to become due, in connection with his employment with the said company, or any other situation that he might, during the continuance of the security, hold in that company, or with any other company, or person, together with all overtime, etc. The deed contained a number of very stringent provisions, including one that the borrower would not, during the continuance of the security, borrow any money, whether on security or otherwise, or part with, sell, pledge, or otherwise dispose of, any of the furniture and effects in his then residence, or obtain credit, or in any way make himself, or his property, answerable for any sum or sums of money, whether legally or morally. It was held by the Court of Appeal (affirming the decision of the Divisional Court) that the deed so unduly fettered the freedom of the assignor that it was void, as being contrary to public policy; and that the consideration for the assignment was one and entire, and that the various provisions of the deed were indivisible. Lord Cozens-Hardy, M. R., thought that the contract was one which put the covenantor in the position which, for want of a better word, he described as *adscriptus glebæ*, as the villein used to be called in mediæval times, and both he and Lord Justice Warrington thought that the deed would prevent the man from employing a doctor in the case of illness in his family, or in respect to any children he might have. Lord Justice Scrutton thought that nothing was more dangerous to the interests of the public than that a system of moneylending like that, to small people in offices, where they have great temptations to be dishonest if money pressure is put on them, and great opportunities, should be allowed to exist for a single minute.

Liability of Local Authority for Accident Arising in Street Darkened Owing to War Conditions.—An important question arose in the recent case of Morrison *v.* Sheffield Corporation as to the liability of a local authority for an accident arising from the extinguishing of lights under a Lighting Order made under the Defense of the Realm Act in consequence of threatened air raids. The plaintiff admitted that if the street lamps had been lit there would have been no danger at all of his running his eye on to an iron spike which formed part of a guard 5 ft. 2½ in. high erected for the purpose of protecting a tree planted in a city street under the powers conferred by section 43 of the Public Health Acts Amendment Act 1890. The contention of the appellants was that, having erected a guard which was perfectly safe under normal circumstances, there was no duty on them to take steps to make it safe under the abnormal circumstances that arose in consequence of the Lighting Order. They pointed out that they had many miles of streets and hundreds of tree guards and other obstacles under their supervision, and it was an extremely heavy burden, if not an impossible task, to render them safe in the darkness, and that, too, at a few days' notice. How was it possible to make the streets safe in the circumstances? Luminous paint had been suggested as a remedy, but, according to their evidence, it was absolutely useless. The answer of the Court of Appeal was that the duty of the local authorities was not only so to erect the tree guards as to be reasonably safe in normal circumstances, but there was also a continuing duty in all circumstances to take reasonable steps to render them innocuous. The duty was not absolute to render them innocuous, but to take reasonable steps to that end. It was open to a jury to find that the guards should, for instance, have been painted white in the seventeen days which elapsed between the chief constable's order extinguishing the lights and the night of the accident. Whether the defendants were in fact negligent, or whether the court would have come to the same conclusion, was immaterial, there being evidence on which the jury could find negligence.

"Niece" as Including Niece of Wife.—The recent decision of Mr. Justice Eve in Re Winn; Burgess *v.* Winn (115 L. T. Rep. 698) confirms the rule, which seems to be well settled, namely, that the fact that a wife's niece has been in a will previously called a niece will not, without more, enlarge the meaning of the word so as to include wife's nieces generally (see Wells *v.* Wells, 31 L. T. Rep. 16; L. Rep. 18 Eq. 504). In Re Winn, a testator made a specific devise to "my niece C. V." He also gave a legacy to "my niece E. L.," and he created a trust for "my niece T. V." He then gave his residue of his real estate in trust for sale, and, after a life interest, to stand possessed of the proceeds "in trust to pay and divide the same to and among all my nephews and nieces (including the said C. V. and T. V.) in equal shares." It was held by Mr. Justice Eve that only nephews and nieces of the testator were entitled to participate. Reliance was placed by counsel for the legal personal representative of a deceased niece of the testator's wife on the decision of the Court of Appeal and House of Lords in Re Jodrell; Jodrell *v.* Seale, (63 L. T. Rep. 15; 44 Ch. Div. 590; sub. nom. Seale-Hayne *v.* Jodrell, 65 L. T. Rep. 57; (1891) A. C. 304. In that case a testator had directed his executors to set apart certain sums of money for the benefit of certain persons by name, some of whom he described as his cousins and others as his nieces, and he gave his residuary estate to be equally divided amongst such of "his relatives thereinbefore named" as, by virtue of his will, should become entitled to a vested transmissible interest in any part of his property. The persons described as the testator's nieces were his wife's nieces, not his own, and some of the persons described as his cousins were illegitimate relatives. It was held by the Court of Appeal and the House of Lords that the words "relatives hereinbefore

named" included relatives by affinity as well as consanguinity, and illegitimate as well as legitimate relatives. That, however, appears to be a reasonably clear case, as "relatives" is a more general expression than "nephew" or "niece," and much weight was attached to the words "hereinbefore named."

Duelling among Statesmen.—The recent fracas between members of the House of Commons in consequence of words of heat in debate, however regrettable, will remind us by its unusual character of the favorable contrast capable of being instituted between the present and the past in respect to quarrels in Parliament. Dueling, which was so frequent an incident in political and other circles in Great Britain in the eighteenth and the early decades of the nineteenth centuries, is now a thing of the past. On the occasion of Pitt's duel with Tierney in 1798, Wilberforce desired to bring the subject before the House of Commons in the form of a resolution, but he found he could not count on more than five or six members to support him, and accordingly relinquished his intention. Mr. Addington (Lord Sidmouth), the Speaker of the House of Commons, so far from interfering to prevent the duel between Mr. Pitt and Mr. Tierney, went with Pitt as his second to the place where it was fought, as he relates in his diary: "I was dining with Lord Grosvenor when a note was brought to me from Mr. Pitt stating that he had received a hostile message from Mr. Tierney and wished me to go home. Mr. Pitt had just made his will when I arrived. On the following day I went with Pitt and Ryder (Pitt's second) to where their chaise awaited to take them to Wimbledon Common." The immense number of conspicuous statesmen who fought duels, which were considerable political events, is very striking. Among the Prime Ministers of George III, Shelburne fought with Colonel Fullerton, Pitt with Tierney, and Fox with Adam; and at a later period Canning fought with Castlereagh, the Duke of Wellington fought with Lord Winchilsea, and Peel twice challenged political opponents. At a time comparatively so recent as 1834, Lord Althorp, then leader of the House of Commons, and Mr. Shiel, the eminent leader of the Irish Bar, were committed by the House of Commons to the custody of the Serjeant-at-Arms, whence they were not released until they had submitted themselves to the House and given assurances that they would not engage in hostile proceedings; and in 1845, in the case of Mr. Roebuck and Mr. Somers, the sending of a challenge by one member to another, in consequence of words spoken by him in his place in Parliament, was held to be a breach of privilege, to be dealt with accordingly unless a full and ample apology were offered to the House. These are but a few out of the many examples that might be given. No revolution of public opinion is more remarkable than that which in the space of little more than a generation has banished from England, and in a great measure from Europe, the evil custom of dueling, which had so long defied the condemnation both of the church and of the law.

Peril Attached to Workman's Particular Location.—Decisions of the Court of Appeal in the few workmen's compensation cases that have come recently before it show in an impressive fashion the marked change of judicial view in regard to the liability of employers to their workmen who have met with accidents. This change has, of course, been wrought by the modified construction which the House of Lords have lately thought proper to place on those vital words "out of and in the course of" in section 1 of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) in cases of which Thom (or Simpson) *v.* Sinclair (116 L. T. Rep. 609; (1917) A. C. 127) and Dennis *v.* A. J. White and Co. (see 140 L. T. Jour. 448) are the most striking examples. Thus, in the recent case of Wales *v.* Lampton and Hetton Collieries Limited, the employers were held by the Court of Appeal to be bound to pay compensation to a workman who had sustained personal injury by accident in circumstances that certainly would not, in times not very far distant, have been regarded as such that the accident must be deemed to be one "arising out of" as well as "in the course of" his employment. On a frosty morning, the workman, who was employed at a colliery, slipped and fell on some ice after he had left the pit and was proceeding towards his home. He was, however, still on the colliery premises, and in the place where, by the terms of his employment, he had to be. The accident occurred close to where the railway lines over which he slipped joined another pair; so that all around the spot there was a network of railway lines which, in wintry weather, would be extremely likely to be slippery and treacherous. Nevertheless, not so very long ago it is more than probable that the workman would have been treated as having incurred no greater risk of suffering from whatever emergencies might be caused by the state of the weather than any other member of the public. He was confronted by a peril common to the public at large, it would have been urged—and no doubt successfully—at a former period. Therefore, a claim to recover compensation from his employer could have no result satisfactory to him. But the circumstance that a workman has, because of his employment, to be in a particular place where an accident befalls him has now to be taken into consideration, by reason of what was laid down in Thom (or Simpson) *v.* Sinclair (ubi sup.). An attempt to bring the present case within the principle of the numerous authorities in which the decisions turned on the fact that the severity of the weather was the cause of the personal injury—such as Warner *v.* Couchman (105 L. T. Rep. 676; (1912) A. C. 35), itself a decision of the House of Lords, and the cases there cited—was hopeless in the face of the later decisions of that tribunal.

Contracts Impugnable because of the War.—Numerous decisions by courts of first instance, and not a few by the higher tribunals, have been pronounced concerning contracts entered into with alien enemies in times anterior to the war which have thereby become capable of being impugned. This plenitude of authority in that respect, in the conditions which now prevail, was what, indeed, was only to be expected. But the question that was raised in the recent case of Veithardt and Hall Limited *v.* Rylands Brothers Limited does not appear to have been before presented in the precise form which had there to be considered. As must have happened, however, in multitudinous instances, the parties to such contracts have, as in the present case, made due provision for the delay and impediments in the actual completion thereof, the same being interfered with through one cause or another. That has been done without seemingly in the least anticipating—even if it were practicable to do so—that which might or would take place in the event of war being declared by the realms of which they are respectively the subjects. Thus, "hindrances preventing execution in due time" and "occurrences which may partially or wholly interfere with the delivery" were what the parties had in contemplation here, but not the exact result of legislation directed against trading with the enemy, and consequently reducing the contract to a mere nullity. An authority somewhat in point was Zinc Corporation Limited *v.* Hirsch (114 L. T. Rep. 222; (1916) 1 K. B. 541). That, however, was no more than hinted at in the course of the judgment of one only of the learned judges of the Court of Appeal in the present case, although Mr. Justice Younger in the court of first

instance felt strengthened in the conclusions at which he arrived by the judgment in that case. But his Lordship thought the present case very similar to that of Distington Hematite Iron Company Limited *v.* Possehl (115 L. T. Rep. 412; (1916 1 K. B. 811). Were the conditions that were incorporated into the contract to be taken as extending to the outbreak of war? That was a contingency that not only would be likely to interfere with delivery, but it would render the further performance of the contract altogether illegal because of the law against trading with the enemy. If the provision made is alone for events which, without affecting the legality of the contract, would affect its execution in due time, the same cannot be taken advantage of in the event of the contract becoming wholly illegal, and, therefore, incapable of execution. Hindrance and prevention are not the equivalent of complete invalidity. The true definition of the expression "hinder" and "prevent," which appeared in the contract that came under discussion in C. S. Wilson and Co. Limited *v.* Tennants (Lancashire) Limited (114 L. T. Rep. 878) was fully expounded in that case.

Actions for Breach of Promise of Marriage.—Mr. Justice Low, in charging a common jury recently in a case in which a man sued a woman for breach of promise of marriage—Vigers *v.* Smith—said that in his opinion it was a scandal that a judge of the High Court and twelve jurors should be there to try such a case; the suggestion that the plaintiff had sustained any damage was too absurd for words. The jury returned a verdict for the plaintiff with no damages, which was substituted, at the learned judge's suggestion, for a verdict with a farthing damages. As £10 had been paid into court, judgment was entered for the defendant. The learned judge directed that the plaintiff should pay the costs of the whole action and added: "It is a public outrage that the action was brought at all." This incident is an illustration of the proverbial delay with which the reform of the law is beset. So long ago as May 6, 1879 Mr. (Lord Chancellor) Herschell moved the following motion in the House of Commons: "That the action for breach of promise of marriage ought to be abolished except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss." The motion was defeated on a division by a majority of forty-one, Mr. Herschell's proposition being supported by sixty-five as against 106. The law with respect to breach of promise of marriage still remains unaltered. A passage from Mr. Herschell's speech more than a generation ago may well be brought to recollection: "When they found that actions of that kind were scandalously abused, it was time that the action should justify itself that they might see on what foundation it rested, whether there was any sound basis on which it could be supported. The action for breach of promise was not so ancient as some persons might be disposed to imagine. This country flourished for many centuries without any person thinking of bringing an action of this description. About two centuries ago it was established that such an action lay, so that there was no flavor of venerable antiquity surrounding it. It was true, however, that as far back as the reign of Queen Elizabeth an action somewhat of this description was brought by a man who alleged that the woman had given him flattering words equal to a promise of marriage, and therefore that he delivered to her money and other things, and that afterwards the woman married another man in deceit and fraud of the plaintiff. But the first action founded on breach of promise was not brought till the reign of Charles I." Mr. Herschell gave it as his opinion that "the law was abused in very many cases, in so many that it was better the action should be abolished." He stated that this proposal would bring the law of England into harmony with the law of other European States, of which he gave the following sketch: "The French law was, with one exception—that of seduction in consequence of a promise of marriage—substantially what he proposed. Damages could only be recovered on account of what was called a préjudice réel. In the Italian Code it was expressly laid down that the mutual promise involved no obligation to contract the marriage, and that, when the promise was in writing, the party who refused to carry out the promise was bound only to reimburse the expenses of the other. According to the Austrian law the party breaking the promise was not liable to the other for anything beyond the actual damage sustained. The Dutch law was substantially the same. In Germany, however, where the engagement was of a more formal nature than in this country, being an official act before the public authorities, one-fifth of the dower might be claimed if one of the parties refused without just cause." Mr. Herschell concluded his speech with the remark: "The more the reform was conceded, the more it would commend itself to the calm sense and judgment of the people." This reform is still, as we have said, a thing of the future.

A Wife's Clothes.—In former days, when a husband and his wife were regarded as one person in the eyes of the law, there was some difficulty in imagining how the wife could at law possess any property apart from the husband. As all the personal property expressed to be given to her at once vested in the husband, it would seem to be an idle form for a husband to make a present of any personal estate to his wife. Equity stepped in, and with its doctrines of the separate use allowed the wife to own property on her own account. The Legislature has gone a step further and allowed her to own separate property, so that nowadays a husband can make a present to his wife without its reverting to himself. This was recognized by the Court of Appeal in Lister *v.* Hooson (98 L. T. Rep. 75; (1908) 1 K. B. 174) where a bankrupt had paid his wife £250 within two years of his bankruptcy and there was a question of set-off as against a mortgage debt due from her husband. If the husband could not have made a present to his wife, there could have been no question as to whether the gift was void as voluntary settlement or as to whether there could be a set-off. It would have remained the property of the husband, but Lord Justice Vaughan Williams said: "Now, the £250 which the husband paid to his wife . . . never could have been recovered from her by the husband." An interesting question as to the husband's property in his wife's clothes was decided in the recent case of Rondeau Legrand and Co. *v.* Marks. In July, 1914, the husband made an agreement with his wife that he was to purchase in his own name his wife's clothing, and that it was to remain his so that he could dispose of it as he chose. The wife's execution creditors, in spite of this agreement, claimed to be entitled to the clothes. Mr. Justice Bailhache upheld the agreement, and held that the clothes belonged to the husband. The husband was, in the learned judge's opinion, bound to provide, but not bound to give, necessary wearing apparel for his wife. The converse case is to be found in Masson Templier and Co. *v.* De Fries (101 L. T. Rep. 476; (1909) 2 K. B. 831), where the Court of Appeal held that clothes bought by a wife for her own use with money which the husband had supplied for the purpose were prima facie her separate property. Lord Justice Farwell said: "Husband and wife were living together in amity; the husband gave his wife money from time to time in order to buy necessaries and clothes suitable for her condition on the terms that she was not to pledge his credit; she did so buy, without any interference from him, and used and wore the purchased articles as she pleased and as long as she pleased. . . .

This is a state of affairs to be found in thousands of houses in the country to-day, and I should have thought that one inference, and one inference only, can possibly be drawn from them, namely, that the husband gave his wife her clothes as her own property, for her own use as she pleased." The same Lord Justice, however, recognized the possibility of some limitation on the wife's power to deal with her apparel: "The husband may impose what conditions he pleases on making a gift to his wife, and husband and wife may make what bargains they please, not being in fraud of creditors or otherwise illegal." That case is also interesting for the account which the Lord Justice gave of paraphernalia. According to Williams on Executors (10th edit., p. 584), the term "paraphernalia" is borrowed from the civil law, but "our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree. What are to be so considered are questions to be decided by the court, and will depend upon the rank and fortunes of the parties." Lord Justice Farwell pointed out that the right was a limitation of the legal rights of the husband's personal representatives, and since the Married Women's Property Act 1882, in his Lordship's opinion, the former legal right of the husband to all his wife's personal property having gone, this exception in favor of the widow must have gone also.

Treaties.—Mr. Balfour, by his visit to the United States and to Canada, has discovered, as he stated in one of his speeches, that the fundamental identities of thought, feeling, aspirations, and outlook which underlie the common civilization of the English-speaking peoples join us "to our friends on the other side of the border," as he termed the people of the United States, "more than all treaties." The expression of this sentiment finds its echo in an appreciative leading article in the London *Times* of May 30, entitled "More than all Treaties." To the student of international morality and its development the question unavoidably occurs, "Are treaties binding?" Sir F. E. Smith, the present Attorney-General, in his International Law, feels constrained to confess that the last authoritative statement as to the binding character of treaties "cannot be confidently accepted." He reminds his readers that the following proposition was affirmed by the Declaration of London in 1870: "The plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Russia, and of Turkey assembled to-day [Nov. 22, 1870] in conference recognize that it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty nor modify the stipulations thereof unless with the consent of the contracting Powers by means of an amicable arrangement." But at the moment of this declaration Sir F. E. Smith proceeds to state, "the Powers concerned were engaged in acquiescing in a flagrant violation of the principle enunciated, for Russia, forbidden by the Treaty of Paris of 1856 to maintain a fleet in the Baltic Sea, had seized upon the opportunity afforded by the Franco-Prussian War to declare herself released from the restriction so imposed without consulting any of the other parties to the treaty. It was not politically expedient to resist by force the Russian claim, and the declaration was an effort to restore the somewhat damaged authority of the principle of the binding effect of treaties." After laying down the proposition that as no Government can indefinitely and for all time bind its successors by treaty, for the community so shackled would no longer be completely independent, it would follow that every state becomes legally entitled to repudiate a treaty of indefinite obligation so soon as the conditions which preceded its formation had undergone substantial modification. Sir F. E. Smith says: "It is difficult to avoid the conclusion that in the present state of opinion [1911], and unless the influence of the Hague Tribunal fosters the spirit of respect for laws more rapidly than can be reasonably hoped, the validity of a treaty depends to an unfortunately large extent upon the power at the moment of the parties to it, and the political importance of the interests which may induce the one party to violate and the other to insist on the maintenance of its terms." Professor Lawrence holds "that where and under what conditions it is justifiable to disregard a treaty is a question of morality rather than of law." Professor Oppenheim thus summarizes the different views as to the binding force of treaties: "That all those publicists who deny the legal character of the law of nations deny likewise a legally binding force in international treaties is obvious. But even among those who acknowledge the legal character of international law unanimity by no means exists concerning this binding force of treaties. The question is all the more important as everybody knows that treaties are frequently broken rightly according to the opinion of one party and wrongly according to the opinion of the other. Many publicists find the binding force of treaties in the law of nations; others in religious and moral principles; others, again, in the self-restraint exercised by states in becoming a party to a treaty. Some writers assert that it is the contracting parties' own will which gives binding force to their treaties, and others teach that such binding force is to be found in *Rechtsbewusstsein der Menschheit*—that is, on the idea of right innate in man."

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## Obiter Dicta

Early in the Morning.—Baker *v.* Dew, 133 Tenn. 126.

The Revolutionary War.—English *v.* Free, 205 Pa. St. 624.

The Empire State in Line.—People *v.* Kaiser, 206 N. Y. 654.

Except to the Pocketbook.—"A loaf of bread of itself is not dangerous."—Per Marks, J., in Freeman *v.* Schults Bread Co., 163 N. Y. Supp. 396.

It All Depends on Who the Dead One Is.—"An indignity to the dead is an offense to the living."—Per Pound, J., in Finley *v.* Atlantic Transport Co., 220 N. Y. 259.

Ground for a Recall.—"Though we affirm, we condemn practically everything that was done below," said the Iowa Supreme Court, in the case of In re Bagnola, 160 N. W. Rep. 228.

Oh! We Don't Know!—"No law-abiding citizen has any inclination to attend a public gathering in possession of fourteen pints of whisky."—Per Armstrong, P. J., in Overton *v.* State, 11 Okla. Crim. 3.

Some Kicker.—In Britton *v.* Lombard (Okla.), 152 Pac. 590, it appeared that a married woman signed a contract "through fear of her drunken husband, who said that if she did not do so he would kick her piano out of the house."

A la Cleopatra.—"The learned counsel for the plaintiffs in error have placed us under obligation by stripping their case to the single naked point which they present for our consideration."—See Jordan *v.* Rudluff, 264 Mo. 132.

What Did They Sell?—The cases of Dew *v.* State, 11 Okla. Crim. 581, Rhine *v.* State, 11 Okla. Crim. 690, Porter *v.* State, 11 Okla. Crim. 714, and Brewer *v.* State, 11 Okla. Crim. 727, were prosecutions for violating the Oklahoma prohibitory law.

Wound Up.—Spring *v.* Ansonia Clock Co., 24 Hun (N. Y.) 175, was an action for the breach of a contract whereby Spring agreed to work for the Clock Company. It seems that Spring did not work properly and his relations with the company were summarily terminated.

Splitting the Infinitive.—"No man, be he officer or otherwise, is permitted to ruthlessly invade the sacred rights of any home." See Duncan *v.* State, 11 Okla. Crim. 222. And it might be suggested that no man, be he judge or otherwise, ought ruthlessly to invade the sacred rights of any infinitive.

Any Kind of an Animal.—Chapter 69 of the New York Consolidated Laws, enacted in 1917 and known as the "Farms and Markets Law," contains the following provision: "The terms 'food,' 'foods,' and 'food products,' shall include all articles used for food, drink, confectionery or condiment by man or other animals, whether simple, mixed or compound."

Where the "Boss" Hangs Out.—"Domicile is the technically preëminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."—Per Mr. Justice Holmes in Williamson *v.* Osenton, 232 U. S. 619. And all that some married men do is to report to their superior at headquarters once a day.

A Paradise for Widows.—"The maxims, 'in doubt the response is in favor of dower' and 'the law favoreth life, liberty, dower' . . . flow naturally from the regard for widows 'running like a thread of gold through common and statutory law and evidenced again and again by the decisions of this court.'"—Per Brown, C., in Jordan *v.* Rudluff, 264 Mo. 133.

Riparian Wet Feet.—In Ledyard *v.* Ten Eyck, 36 Barb. (N. Y.) 102, a case involving the title to the bed of a lake, Campbell, J., put the following question: "How does the state hold the title where it has sold and conveyed away all the land bounded by the lake or river, and where the riparian proprietors stand face to face with their feet touching the outer edge of the water?"

A Temporary Retainer.—An Irish woman sent for a lawyer in great haste, says the Chicago *Herald*. She wanted him to meet her in court and he hastened thither with all speed. The woman's son was about to be placed on trial for burglary. When the lawyer entered the court the old woman rushed up to him and, in an excited voice, said: "I want ye to git a continuance for me boy." "Very well, madam," said the attorney. "I will do so if I can, but it will be necessary to present to the court same grounds for a remand. What shall I say?" "Shure, ye can just till the coort that I want a continuance ontil I can git a bether lawyer to spake for the boy."

Liquor Consumption in North Carolina.—Speaking of an intoxicating liquor statute passed in 1907, Chief Justice Clark of the North Carolina Supreme Court said in State *v.* Williams, 146 N. C. 637: "In limiting each person to a half-gallon per day for his own use, the Legislature was not niggardly." After reading which, we are minded to ask what was the average daily consumption of liquor per citizen in North Carolina prior to the adoption of the statute?

The Blind Majority.—It goes without saying that from the standpoint of the dissenting judge, the majority of the court are willfully and blindly wrong, and he generally takes a great deal of satisfaction in telling them so. As a somewhat novel and extremely gentle method of chiding a stubborn majority, we recommend the following closing paragraph of the dissenting opinion in State *v.* Jones, 106 Miss. 598: "In conclusion, I venture to suggest to my associates a careful and thoughtful consideration of the Golden Text of the International Sunday School Lessons for yesterday, which reads thus: 'Look therefore whether the light that is in thee be not darkness.' Luke xi., 35."

Long Opinions.—One of the committees of the American Bar Association complained at a recent meeting of that body that the opinions of the court are entirely too long. The attitude of the courts themselves on that question is possibly reflected in the following remark made not long ago by the Missouri Supreme Court: "An even dozen alleged errors are urged upon us by defendant's learned counsel. These we condense into five, so that we may not too seriously offend or add further cause for the expressed antagonism of the bar against long opinions (in all cases except those in which they are of counsel)." See State *v.* Baker, 264 Mo. 349. It does seem to make a difference whose ox is gored.

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"Indeed, it may be said to be generally true that the weaker a party and the smaller his interest, the greater the need of the strong hand of the court to ascertain and protect his rights." Brewer, J., Montana Co. *v.* St. Louis Min., etc., Co., 152 U. S. 170.

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"In accidents of employment, especially where the injuries are serious, there is a tendency always to impute blame to some one. The servant blames his master; the master attributes contributory negligence to his servant. We are apt to forget that accidents are not infrequent, for which no one is really to blame at all." Per William Bartlett, C. J., in Paul *v.* Consolidated Fireworks Co., 212 N. Y. 117.

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"The rule in ethics is, that 'when the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the promisee received it,' and this is the established rule at law, as well as in morals. In the language of the books, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee." Per Allen, J., in White *v.* Hoyt, 73 N. Y. 505.

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# Law Notes

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### The "Bulwark of Liberty."

THAT sapient humorist Mr. Dooley once remarked that the difference between two distinguished American statesmen was that one thought the national street car should be driven with the controller handle while the other thought it should be propelled solely by the use of the brakes. There is a small class of lawyers who seem to hold firmly to the brake handle theory of government, and regard the limiting provisions of the constitution as the sole guardians of our national liberty against a tidal wave of legislative oppression. A short answer to that contention is afforded by the condition of states which have no written constitution. If every constitutional limitation in the United States was repealed to-morrow we should no more lose our liberties than the English and the Canadians have done. If any person wishes to go beyond that obvious rejoinder, let him examine the digests for the past decade and see just how important it would be if every act which has been declared unconstitutional in that period was now in force. He will find among the acts which have been judicially nullified some which he will think wise and useful, some which he will think unwise, but not one whose enforcement would jeopardize the national welfare. The true security against legislative oppression lies in the fact that every legislator is responsible directly to the people, not in the fact that a judiciary which is not so responsible has the power to nullify a statute. The matter is not without importance, because undue emphasis on a fictitious guaranty of liberty detracts attention from the true guaranty. Electors may be made less careful in the selection of their legislative agents by the thought that in some mysterious automatic way the constitution sifts the chaff from the annual grist of the legislative mill. It cannot be too often said or too well understood that nations are free and well governed in proportion as the people are intelligent, liberty loving and inspired by true idealism.

### A Modern Instance.

A STRIKING illustration of constitutional fetish worship is afforded by a widely circulated pamphlet written by Mr. Hannis Taylor, expounding the view that the drafting of the state militia into the national army for duty over seas is in violation of the constitution. To Mr. Taylor cannot be imputed the motives which have inspired some other persons to the same contention. He is a patriotic American who has in the past served his country well, and is doubtless animated by no desire other than that for the national welfare. What is it then which moves such a man to urge that the United States should keep aloof from the battle front until our allies are crushed and the host that marched through Belgium is landed on our shore? Simply the belief that the constitution so requires. Postponing for the moment a consideration of the soundness of the belief, what is it that induces a man so believing to try to bring others to his way of thinking? Only a viewpoint from which the violation of a clause of the constitution is of more serious import than the devastated cities, slaughtered men and ravished women which a different course of national conduct would entail. Instead of rejoicing that the foremost constitutional lawyers of the country are convinced that the fancied constitutional obstacle does not exist, the writer accuses them of "standing mute in the presence of the most sacred duty that ever confronted them" and rejoices in the belief that "the constitution is safe in the hands of its official guardians, our courageous and incorruptible Federal Judiciary who will draw the sword of justice from Boston to San Francisco the moment that the constitutional exemption in question is actually violated." It is perhaps sufficient to call attention to the view of the courageous and incorruptible Federal Judge Speer, presented in our last issue.

### Drafting the Militia.

TAKING up the question on its merits, there seems to be singularly little ground for the fear that the Constitution is violated by the drafting of the militia into the National Army for service abroad. The power of Congress to provide a military force is found in two clauses of Art. I, § 8: "The Congress shall have power to raise and support armies." "The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." It is very probable that Congress acting under the second clause could not provide for sending abroad the militia called forth thereunder. The fundamental error lies in the assumption that Congress was acting under that clause in passing the Act of June 3, 1916. It was, on the contrary, acting under the absolute and unqualified power "to raise and support armies." That power, it has been held by every court passing on the question, warrants the raising of armies by conscription. And on that power to conscript there are no constitutional limitations. Congress need not select conscripts by lot. It may draft them by name, by occupation, by membership in particular organizations. Certainly there is no constitutional immunity from conscription to members of the state militia. There

is no restriction on the manner in which they may be drafted; no constitutional obstacle to their conscription singly, by company, by regiment, or in any manner that Congress may prescribe. When so drafted, they cease to be militia, and are simply citizens conscripted into the National Army. The provision as to the purposes for which the militia may be called forth has no more application to them than it has to men similarly drafted whose membership in the militia terminated a decade before the draft. This is so plain as to be well nigh syllogistic. Certainly there is no excuse for any confusion of thought on the part of a lawyer.

#### Military Service as Education.

AT the present time when thousands of young men are leaving the law schools and offices for the barracks and training camps, the thought naturally arises how far their professional future may be impaired by the curtailment of scholastic training. It is gratifying to note the testimony of a man who, though more distinguished in other fields of endeavor, was none the less a credit to the legal profession. In his autobiography Charles Francis Adams says: "Looking back now, fifty years after, were I asked whether I would give up as an experience of subsequent value, both educationally and in the way of reminiscence, my three years at Harvard or my three and a half years in the army, I would have great difficulty in reaching a decision. On the whole I am inclined to think that my three and a half years of military service were educationally of incomparably the greater value of the two." It is very probable that the majority of the professional men who have donned the khaki will in future years agree with Mr. Adams. They will gain that intimate knowledge of human nature which comes only from contact with men in the great realities of life. They will gain in steadfast and disciplined resolution. They will gain that exaltation of personal character which comes only to the man who sacrifices for a principle, deeming it greater than himself. There are few who are qualified to speak for the bar who will not say that these are among the greatest assets which the candidate for professional honors can possess.

#### The War Power.

IN our June issue we quoted and contrasted the views of Mr. Madison on the war power of the United States (41 Federalist, p. 191) with those expressed by Mr. Jeremiah Black in his argument in Ex parte Milligan (4 Wall. 2). A writer in a recent issue of *Case and Comment* (Sept., 1917, p. 296) takes issue with the position there expressed, saying: "Permit me to dissent from the editor's view. I do not think Mr. Madison's position is the view only of a statesman or publicist, but not of a lawyer; neither do I think Mr. Black's view a proper legal view." It is respectfully submitted that the concluding words of the quotation from Mr. Madison are most distinctly those of a man whose point of view rises above legalism and contemplates the inherent human rights of aggregated persons. "It is vain," he said, "to oppose constitutional barriers to the impulses of self preservation." But if our critic ascribes to us the view that only by a violation of the Constitution can war be prosecuted with effect, he has missed the point. There is no need to resort to the doctrine that self preservation transcends constitutional barriers. In the graphic words of Mr. Hughes, the fathers of the republic made a "fighting Constitution," not a "spectacle of imposing impotency." The war power is a constitutional and not an ultra-constitutional power. Just as the constitutionally created police power overrides sundry other constitutional rights of property and personal liberty, so the war power, overriding certain privileges of peaceful times, does so within and because of the Constitution and not in defiance of it. It is one of the aberrations of undisciplined minds that the constitutional power which may lawfully conscript ten million men to expose their bodies to the horrors of war stands impotent before the "personal liberty" of a soap box orator. It is therefore the publicist's and not the lawyer's viewpoint which refers to national self preservation as transcending the barriers of the Constitution. The lawyer knows that the Constitution contains no such barriers, knows that "the power to wage war is the power to wage it successfully."

#### Change of Name.

AS a collateral result of the war, it is very probable that a number of persons whose Teutonic names belie their patriotic convictions have sought the aid of the courts to relieve them from the misleading designation. It is reported that two such applications have been denied recently in New York City. In one case the ground of the denial, a fanciful one it must be confessed, was that the applicant had selected the name of "Wilson," the court apparently not thinking that any sincere flattery inhered in the imitation. In a still more recent case an application by a man named Eckstein was denied, Justice Goff saying: "It is inconceivable that a man who is rendering the exemplary service in the Ambulance Corps at the front in France which this applicant is said to be rendering should be the subject of any unpleasant and disagreeable consequences because of the name he bears." It seems that a judicial change of name is not a matter of right but rests in the discretion of the court. See *In re Taminosian*, Ann. Cas. 1917A 435. In New York that rule is deemed to require of the applicant a showing of a distinct necessity for the change. See *Snooks' Petition*, 2 Hilt. 566, wherein the court refused to permit the petitioner to change his somewhat unmusical cognomen, despite the fact that a prospective business partner demanded a change. In most jurisdictions the question is wholly academic, for there is nothing to prevent a man changing his name at will without resort to the courts. Statutes permitting a judicial change are ordinarily construed as being in aid of the common-law right. See *Laflin, etc., Powder Co.* v. *Steylter*, 146 Pa. St. 434. So in *Smith* v. *United Casualty Co.*, 197 N. Y. 420, Judge Vann, after an interesting review of historical instances of change of name, said of the statute: "It does not repeal the common law by implication, but gives an additional method of effecting a change of name." The attention of those who do not desire to change their names, yet resent any implication of enemy origin based thereon, is called to the possibilities suggested by the holding in *Slazenger* v. *Gibbs*, 33 T. L. R. [Eng.] 35, that it is an actionable defamation to assert falsely that a person is a German.

#### Marriage by Telephone.

MARRIAGE by proxy has long been recognized in some parts of Europe, and several recent instances have been reported of such marriages, where the exigencies of

military service prevented the personal attendance of the groom. In the United States marriage by proxy is unknown but it is reported that military neeessity has recently led to an analogous expedient, an officer at Camp Mills, L. I., being wedded by telephone to a woman in Georgia. There is little question as to the validity of this particular marriage, it being of course assumed that the identity of the parties was properly ascertained. A common-law marriage is valid both in New York (*Ziegler* v. *Cassidy*, 220 N. Y. 98) and in Georgia (*Drawdy* v. *Hesters*, 130 Ga. 161), so that the interesting question of the locus of the matrimonial contract becomes immaterial. A contract made by telephone is valid (*Yolo Bank* v. *Sperry Flour Co.*, 141 Cal. 314; *Tynu* v. *Converse*, 180 Mich. 195; *Herendeen Mfg. Co.* v. *Moore*, 66 N. J. Law 74), and certainly no greater formality is required of a contract as favored by the law as that of marriage.

But in jurisdictions where an official or ceremonial marriage is requisite some difficulty is presented, as it is very doubtful whether an official transaction can be conducted by telephone. An oath cannot be thus administered (*Carnes* v. *Carnes*, 138 Ga. 1; *Sullivan* v. *National Bank*, 169 App. Div. (N. Y.) 469). Neither may a wife's separate acknowledgment to her husband's deed be taken by telephone (*Wester* v. *Hurt*, 123 Tenn. 508, Ann. Cas. 1912C 329). If the practice becomes common it may be necessary to enact a law as to soldiers' marriages analogous to the testamentary privileges now accorded.

**Shorter Opinions.**

THE recommendation of shorter judicial opinions by a committee of the American Bar Association, to which we referred in our last issue, has been productive of much comment from the lay press. The views expressed vary from serious and unqualified approval of the recommendation to alleged humor based on the idea that bench and bar are in a conspiracy to keep the law in a confused state for their own greater profit. Mingled with these is a considerable amount of misapprehension as to the purpose which a judicial opinion serves. For instance, one journalist opines that "the ideal law report would be one in which a brief statement of the facts would be followed by the finding of the Court for the plaintiff or for the defendant, as the case may be." It would indeed be an ideal report—for the lover of litigation. It rarely happens that two cases are absolutely "on all fours," identical in every fact. If an opinion does not disclose unmistakably the rule of law which the court lays down, the precedent becomes valueless and there is nothing to do in subsequent cases but to appeal and speculate on the value of some small differentiating fact. While of course no lawyer would give countenance to any position so extreme, it serves to emphasize the other aspect, that it is quite possible for judicial opinions to be so short as to produce evils far greater than those arising from prolixity. A judicial opinion does more than decide the case—a per curiam order would do that as effectually. An opinion is designed to settle the law—to serve as a guide to attorneys in advising and trial courts in deciding future litigation. Unless it is long enough to make the views of the court plain to the profession, it had better never have been written. This is a very different thing from the preliminary rehash of settled doctrines by which many opinions are swelled into undue proportion, and which the bar committee justly criticised.

**Legislative Partiality for the Farmer.**

MORE than one imposing but short lived political movement has been launched on the basis of a claim that the farmer is the victim of oppressive economic and legal conditions. From the purely legal standpoint it would seem, on the other hand, that the tiller of the soil is the favored protégé of the legislature. He is exempted from the Workmen's Compensation Act; the Clayton Act excepts agricultural societies from the anti-trust law; requirements of a license for peddlers and transient merchants quite uniformly exempt farmers vending their own products. The latest exhibition of legislative favor is found in the farm loan acts, passed by Congress and several state legislatures. In *Hill* v. *Rae*, 52 Mont. 387, such an act was sustained, the court saying: "It is a matter sufficiently notorious to charge the court with judicial knowledge that, according to the federal census of 1910, approximately one-third of our productive population is engaged in agriculture. From time immemorial it has been fully realized that the economic relations of that pursuit to all other forms of human activity are of the first importance; other things, other occupations, may be dispensed with at more or less cost to society, but without agriculture, civilization itself must fail."

But in one recent instance the legislative discrimination in favor of the tiller of the soil has suffered a judicial check and one which all except the beneficiaries of the act will admit was timely. In 1906 the Kentucky legislature provided that it should be lawful for farmers and tobacco growers to pool their crops for the purpose of obtaining a better price. In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, the effect of that act was caustically discussed. The court referred to the earlier anti-trust legislation and said: "When the Court of Appeals came to deal with the act of 1890, the constitution of 1891, and the act of 1906, it reached the conclusion, which now may be regarded as the established construction of the three taken together, that by interaction and to avoid questions of constitutionality, they were to be taken to make any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. The result seems to be that combinations of tobacco growers are held to do no more than restore an equilibrium that has been disturbed by a combination of buyers, whereas if prices rise after a combination of manufacturers it very nearly is presumed that the advance is above the real value and that there is a crime."

In view of this graphic presentation of the situation the Kentucky court in *Gay* v. *Brent*, 166 Ky. 833, held the act in question to be void.

**Dancing as Charity.**

THE charity ball has long been an honored institution of society, though the cynical have often been led to remark that the poor would be more substantially helped by the gift of half the sum spent for ball gowns. In two recent cases the grave expounders of the law have had occasion to consider dancing in connection with the legal concept of charity. As might be expected, a distant tolerance of the Terpsichorean art was all that could be extracted from the court. In *Gibson* v. *Frye Institute*, 137 Tenn. 452, the court sustained as a charity a gift to erect a place of amusement for working people including, inter alia, "library,

lecture halls, and dancing halls." The court said: "If the dancing halls and other rooms for moral amusements contemplated by Mr. Frye were not connected with the library and lecture halls, we would doubtless follow the authorities relied on by complainants, and hold that the trust attempted was invalid. The dancing and other amusements, however, were intended by the testator to be carried on in the same building and under the same roof with library and lectures. These means of amusement are calculated to draw people into the institution, and to make it popular with those whom the testator intended to benefit. The general effect of the institution to be founded will be educational by reason of the library to be therein contained and by reason of the lectures there to be delivered. If the dancing and amusements mentioned are calculated to bring the people of Chattanooga within the influence of the educational features of the institution, then we think such dancing and amusements are merely accessory and auxiliary to the main purpose of the trust, and should not be held to vitiate such trust."

But while a library will "take the cuss off" a dancing hall, a donation to charity of surplus funds of its dances will not give a charitable aroma to an Elks Club Room (*B. P. O. E.* v. *Koelin*, 262 Mo. 444).

**Simplified Federal Procedure.**

WHILE the pressure of more important concerns has deferred action on the bill authorizing the Supreme Court to adopt rules regulating the procedure in actions at law in the federal courts, the issue has been squarely raised by the majority report of the Senate Committee on Judiciary in favor of the plan and the minority report opposing it, and action on the bill at the next session is to be expected. Since a measure of presumption in favor of the bill arises from the indorsement of the American Bar Association, it is interesting to note the objections urged by the minority. Primarily the minority report advocates the principle embodied in the Conformity Act, urging the inconvenience to the lawyer who is compelled to observe one system of procedure in the state court and another in the federal court. To this it may be answered that while a large number of the states have abolished the distinction between law and equity procedure, equity practice is conducted in the federal courts under rules prescribed by the Supreme Court. The advantage of the change to an attorney whose practice extends into the federal courts of several states is minimized by the minority, who say: "Not one lawyer in a hundred ever goes beyond the bounds of his state to try a lawsuit." This is true enough perhaps as it is stated, but it certainly is not true that ninety-nine out of a hundred of the cases in federal courts are tried by attorneys resident in the state where the court is held, and that is the real point at issue. For instance there are 198 cases reported in volume 240 of the *Federal Reporter*. In 45 of these or approximately one in four, counsel residing in two or more states appeared. The suggestion that attorneys having federal business in states will "associate some local firm familiar with the other practice of the state" smacks somewhat of trade union ethics. Meanwhile no thought is taken of the judges of the federal Appellate Courts. A table prepared by a member of the Bar Association shows that in a three months' period taken at random over 49% of the points decided by the federal courts related to practice. Aside from the crying need for a better system of practice which this discloses, it means that the judges of the Circuit Court of Appeals must spend much of their time in passing on practice questions arising under ten or a dozen separate systems. The waste of judicial time involved is obvious and is of itself a strong reason for a uniform federal procedure.

**Rules of Court v. Legislative Codification.**

THE minority of the Senate Judiciary Committee in opposing the proposed rules of procedure argue in favor of a legislative rather than a judicial Code. This viewpoint seems utterly to overlook the advantage of flexibility which inheres in a system of judicial rules. The federal judiciary devotes its entire time and attention to the one task of administering justice. Any defects in the system of procedure come immediately and directly to the attention of the rule making body, and are to them a matter of primary and personal concern. Congress on the other hand is concerned with a multitude of affairs, wholly foreign to judicial procedure. Its activities are swayed by cross-currents of political strategy and individual ambition. Any information its members can gain as to the defects of a Code of procedure must be at second hand. Moreover, as was said in the report of the majority of the Senate Committee: "It is an anomaly to intrust a tribunal with grave and responsible duties and deny it the power to determine the manner in which these duties shall be discharged. The Senate would not for one moment tolerate the idea of having some outside body determine the way in which it shall do its business. Each house of Congress and every legislative body in the country makes its own rules of procedure. The same is true of substantially every administrative body, state and federal. Congress is constantly passing laws to be executed by one of the executive departments and providing that the head of the department shall make such rules and regulations as may be necessary to carry the law into operation. The courts seem to stand almost alone in this respect. These great tribunals intrusted with the delicate and responsible duty of interpreting and administering the law are certainly qualified to determine the mode and manner which will be best calculated to enable them to discharge their responsibilities surely and promptly."

## INJURIES TO THE "HIRED GIRL."

WHILE a large amount of personal injury law has been relegated to the scrap heap by the Workmen's Compensation Acts, the liability for injuries sustained by the "hired girl" still rests on common-law grounds. The American Compensation Acts, unlike the English act, uniformly exempt domestic service from their operation, and the discrimination is sustained as legitimate and reasonable. It is somewhat surprising to note how few cases of injury to such servants have arisen in the history of American jurisprudence. It is also remarkable that the ancient jest concerning the servant who lit the fire with kerosene is wholly without a foundation in judicial history, though her ultra-modern successor who blew up the gas stove did succeed in breaking into the reports. See *Holmberg* v. *Jacobs*, 77 Oregon 246.

There has been some slight suggestion that a semi-paternal responsibility rests on the employer of a domestic servant. *Larson* v. *Berquist*, 34 Kan. 334. That was a

unique case, wherein it appeared that during the employment of a youthful domestic her menses began. She consulted her mistress, who advised her "that menstruation was a dangerous disease likely to cause insanity and death and that the best and only known remedy therefor was hard and unremitting labor." By this guileful counsel the unfortunate girl was led to overwork, to the serious detriment of her health. The employer was held liable in damages.

The general rule is, however, that the employer of a domestic is, like other employers, liable only for negligence. Thus in *Flynn* v. *Beebe*, 98 Mass. 575, it appeared that the busy housewife, endeavoring to expedite the laundry work, poured a kettle of hot water into the tub. Shortly thereafter the servant cut her hand on a piece of glass which in some unexplained way had gotten into the tub. The court said: "There was no evidence to show how the piece of glass which cut her hand came into the washtub. The probability would seem to be that it either adhered to the skirt which was to be washed, or was in the kettle upon the stove from which water was taken. But in either case it did not appear that the defendant or his wife knew, or had any reason to suspect, that it was there; or that there was any want of due care on the part of either."

But even within that limitation the courts have asserted a liability in a variety of cases large enough to afford some consolation to the man unable to keep a servant. The employer is bound to provide his domestic with a safe place to sleep and is liable if a defective ceiling in her bed room falls on her. *Siedentop* v. *Buse*, 21 App. Div. (N. Y.) 592; *Anderson* v. *Stemreich*, 32 Misc. (N. Y.) 680. In like manner he has been held responsible for a cold resulting from a leaky roof in the servant's sleeping room, *Collins* v. *Harrison*, 25 R. I. 489; and for illness resulting from tainted food furnished for her use, *Bark* v. *Dixson*, 115 Minn. 172. Unless he spends his evenings and Sundays very diligently fixing up around the house he is liable to respond in damages, for he is liable if the servant steps into a hole in the porch floor, *Fearon* v. *Mullins*, 38 Mont. 45; or falls into a disused well in the yard, *Cordler* v. *Keffel*, 161 Cal. 475; or is injured by the fall of a defective skylight, *Shaw* v. *Feltman*, 121 App. Div. (N. Y.) 597; or is precipitated into the cellar by the tipping of an insecure trapdoor, *Burnside* v. *Peterson*, 43 Colo. 382; or falls on a flight of stairs from which the ice has not been cleared, *Mahony* v. *Dore*, 155 Mass. 513. So in *Battle* v. *Robinson*, 27 R. I. 588, it appeared that the hired girl returning at midnight after her night off, passed through an unfastened gate in the yard leading to a dangerous passageway and was injured. The employer was held to be liable, the court saying: "She had never used the passage in which the accident occurred, and had received no warning that the depression was there. So far as she knew, this passage was as safe as the other, and it was a shorter and more convenient way for her to get to her room than was the other way, which involved a walk around three sides of a rectangle of which the way she took was the fourth side. We think that, in these circumstances, it was negligence on the part of the defendant to leave the gate unfastened at night without at least placing a light there or giving warning of the danger to the plaintiff."

In *Steinhauser* v. *Sproul*, 127 Mo. 541, a married woman succeeded in escaping liability at the expense of her husband. Mrs. Sproul directed a servant to get certain pigeons, which task involved the use of a ladder. By reason of a defect in this implement the servant was injured, but the court held that as the ladder belonged to Mr. Sproul his wife was not liable, the order given by her not being in itself negligent.

In each of the foregoing cases not only the negligence of the employer but contributory negligence and assumption of the risk by the servant were held to be for the jury, and each jury with the monotonous regularity with which the profession is familiar found all the issues for the plaintiff.

But having imposed a liability in so wide a variety of domestic calamities the courts have relieved the employer from liability for negligence other than his own, the fellow-servant doctrine excluding liability for injuries caused by the acts of other servants. *McGuirk* v. *Shattuck*, 160 Mass. 45; *Erjanchek* v. *Phipps*, 146 App. Div. (N. Y.) 545; *Ryan* v. *Phipps*, 146 App. Div. (N. Y.) 642. The contrary was held, however, under a somewhat peculiar contract in *O'Bierne* v. *Stafford*, 87 Conn. 354. In *Waxham* v. *Fink*, 86 Neb. 180, 21 Ann. Cas. 301, the fellow-servant doctrine was applied to the act of a fourteen-year-old son of the employer, who after going down cellar after coal, left the trapdoor open. That decision will bring a measure of relief to every reader who is the head of a family and knows what it would mean to be liable in tort for the activities of a small son in the prosecution of his feud against a cook over stingy with the cookies.

Those whose communities have not been engulfed in the advancing tide of prohibition may also take comfort from the decision in *Moriarty* v. *Miller*, 99 Neb. 614, that a scrubwoman assumes the risk of kneeling on beer bottle caps lying on the dining room floor. The court said: "The proper performance of her cleaning duty seems to require that a scrubwoman should look at the floor she is cleaning and pick up any waste matter or articles which have dropped on it. It seems clear to us that in scrubbing floors it is a very ordinary and common danger that tacks, pins or other foreign substances which if knelt upon will produce injury may have dropped upon the floor." So the risk of injury from a slight irregularity in the kitchen floor is assumed. *Herold* v. *Pfister*, 92 Wis. 417. And a domestic assisting the employer in stopping a leak in the water tank is held to assume the risk of the tank falling in the course of the amateur plumbing operation. *Jonas* v. *Blanchard*, (Ga.) 91 S. E. 61. But let dog fanciers take notice that a seamstress does not assume the risk of injury from a vicious dog kept in the kitchen. *Mansfield* v. *Baddeley*, 34 L. T. N. S. [Eng.] 696.

Of course if a servant voluntarily departs from the scope of her assigned duties and engages in some unauthorized pursuit there is no liability for an injury which may result. *McMahon* v. *O'Donnell*, 32 Neb. 27. In that case it appeared that a nurse girl, tiring of amusing the children in conventional ways, undertook with their assistance to operate a straw cutter.

The foregoing citations comprise, it is believed, substantially every case which has passed on the liability for personal injuries to a domestic servant. They mark on the legal side a transition of which the housewife has long been aware on the economic side—the evolution of the domestic servant from slavery to independence.

W. A. S.

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"Suspicion is not proof, nor conjecture evidence, upon which courts can act in determining the rights of parties." Per Collin, J., in People *v.* Manganaro, 218 N. Y. 9.

## WHAT IS NEGLIGENCE?

*Decisions Denying Recovery under Federal Employers' Liability Act.*

IF, as has been asserted in previous articles, liability is to be determined with a view to the comparative knowledge of the parties respecting the perilous instrumentality or condition, a very interesting problem is presented by the Federal Employers' Liability Act and other enactments that purport to abolish the defense of contributory negligence. In the phraseology of the Federal statute, "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." And the only conclusion to be drawn from these words, if our theory is correct, is that employees of interstate railroads are entitled to recover in all cases of injury, no defense whatever being open to the employer. The statute says that the employee shall not be barred of recovery by contributory negligence, and contributory negligence, according to the writer's formula, consists in action or nonaction accompanied by a knowledge of the danger.

Yet, we know that the United States Supreme Court in recent cases has held that under certain facts no recovery will be allowed to employees who bring suit under the statute. Is our theory wrong, or is it possible that the court has nullified the statute in these cases? Let us have a look at the decisions. In *Southern R. Co.* v. *Gray*, 241 U. S. 333, 36 S. Ct. 558, 60 U. S. (L. ed.) 1030, the court said that "negligence by the railway company is essential to a recovery," and it was concluded that there was "not a scintilla of evidence to show this under the most favorable view of the testimony."

In *Reese* v. *Philadelphia, etc., R. Co.*, 239 U. S. 463, 36 S. Ct. 134, 60 U. S. (L. ed.) 384, the court reached a like conclusion, saying: "The rule is well settled that a railroad company is not to be held as guaranteeing or warranting absolute safety to its employees under all circumstances, but is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures." And in *Great Northern R. Co.* v. *Wiles*, 240 U. S. 444, 36 S. Ct. 406, 60 U. S. (L. ed.) 732, a judgment for the plaintiff employee was reversed.

But in the opinion in the Reese Case, supra, the court noted that "deceased was a capable, experienced fireman in a night switching crew operating in the yard, which was properly lighted, and acquainted with the general conditions described." In the Wiles Case, supra, it was said: "There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles—a duty not only to himself, but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles *knew* them, and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His *neglect* might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its *neglect* in any way would cast immeasurable liability upon the railroads. . . . In the present case there was nothing to extenuate Wile's *negligence*; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. *He knew the danger of the situation* and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed."

Do not these extracts from the opinions express the true ground of decisions? And was not that ground the failure of the employee to act after having acquired knowledge of the danger that confronted him? As for the Gray case, supra, it was shown that the employee went to sleep on the track, and that the driver of the train by which he was killed exercised vigilance to discover and avoid the calamity. This was a plain case of contributory negligence within the Doctrine of Last Clear Chance. See LAW NOTES, vol. 21, p. 85.

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## PUBLIC RIGHTS OVER THE SEASHORE.

IN these present times the attractions of the sea are somewhat marred from a variety of causes, most of which are too obvious to require mention. But there are many places on the coast where those who are fortunate enough to be able to take a holiday, and who are not prevented from traveling far afield by the increased railway fares, may put to healthful use the facilities for enjoyment afforded by the foreshore. It is to the foreshore from a legal point of view that we propose to address our remarks. It is with the permanent law, as compared with war law, that we propose to deal. The regulations, restrictions, and prohibitions existing in many such places nowadays will all disappear. They are merely transitory. The Defence of the Realm Acts and all the host of orders, rules, and directions which have been promulgated under cover of those Acts will in the ordinary course of things be relegated to the limbo of the past. The permanent law, as we use that expression, will survive, as it has survived ever since the days of Queen Elizabeth—for that matter, ever since Anglo-Saxon times.

The greatest authority on our law of the seashore was Sir Matthew Hale. His knowledge of the subject was remarkable. Whether he actually believed in the historical accuracy of the theory of Royal ownership of the foreshore may be doubted. It is a convenient theory, and that seems to be the best that can be said for it. But it has furnished the ground for case after case, and must now be taken to be absolutely established. It is doubtful whether any useful purpose would be served by agitating this subject anew. Certainly in a brief article of this kind justice could not be paid to the merits of either case. It will suffice for our purposes if we remind the reader that up to the days of Queen Elizabeth the theory of Crown ownership had not been established. In fact, the foreshore was then, as it almost always is now, found to be in private ownership—an ownership capable of establishment either from long possession or from some grant by way of confirmation from the Crown. It would

not be safe to deduce from this that the existence of confirmatory grants proved the theory. But whether the theory be well or ill founded, for all practical purposes nowadays we may take it as a rule of law that unless the foreshore is in private ownership it is the property of the Crown, and further that, where it is found to be in private ownership, the owner is to be regarded as deriving title from the Crown.

Now, what do we mean by the word "foreshore"? The answer to this question has been furnished by the case of *Attorney-General* v. *Chambers* (1854, 4 De G. M. & G. 206), at any rate as regards the landward limits of the foreshore. The landward limit of the foreshore is the line which the flood tide reaches at an ordinary tide occurring between the neap and spring tides. The neap tides are, as the reader is no doubt aware, tides occurring for some few days in the lunar, or rather tidal, month, when the variation between the high water and low water is least. Contrariwise, the spring tides occur when the variation is greatest. Suppose at any one point the rise and fall of the tide is 16 feet at spring tides, measured horizontally, and the rise and fall at neap tides is 10 feet, the point marked by high water at an ordinary tide between these two times is the datum line. This is a horizontal measurement, which the reader may observe at any point on a quay wall, or on cliffs or rocks rising out of deep water. At the time when the observer finds his datum line, the landward limit of the foreshore is marked automatically at all points along the coast in the neighborhood. Where the coast is shelving or flat, the landward limit of the sea at this time may be 150 yards, or even much more, from the seaward limit of the foreshore.

The seaward limit of the foreshore is the landward limit of the sea bed. There are occasions when, through some rare coincidence of tidal influences and winds, the sea falls abnormally, exposing land which is almost always covered by the sea at low tide. Whether this land is to be included in the term "foreshore" is open to doubt, but it would seem that it ought not. Lord Cranworth's judgment in *Attorney-General* v. *Chambers* (*sup.*) would appear to be against including such land in the foreshore. So also would Mr. Justice Holroyd's judgment in *Blundell* v. *Catterall* (5 B. & Ald. 268).

From the nature of the case, the limits, both landward and seaward, of the foreshore are liable to variation from natural causes. In some parts of the coast—especially on the east and south coasts—this variation is considerable. As is well known, there are places on the south-east coast now far beyond the reach of the flood tide which not very many years ago undoubtedly formed part of the foreshore. There are also places where the opposite change is continually in operation. Many cases of nicety have arisen in relation to this change. The gradual receding of the sea results in a transmutation of possession. The sudden shifting of the limits of the foreshore does not, however, result in any alteration of ownership. In the case of *Rex* v. *Yarborough* (1828, 2 Bli. N. S. 147) Lord Chief Justice Best, after reviewing the authorities, said: "Here it will be observed that there is a distinction made between lands derelict and lands formed by alluvion, which distinction, I think, is founded on the principle which I have ventured to lay down, namely, that alluvion must be gradual and imperceptible, but the dereliction of land by the sea is frequently sudden, leaving at once large tracts of its bottom uncovered, dry, and fit for the ordinary purposes for which land is used." The title by alluvion is a title by imperceptible accretion. Lord Lindley, when a Lord Justice, in the case of *Hindson* v. *Ashby* (74 L. T. Rep. 327; (1896) 2 Ch. 1, at p. 13), pointed out that there were great difficulties attending this question of the transmutation of ownership through accretion, and in his Lordship's view the doctrine only applied in the absence of a fixed boundary, and only where the edge of the water marked the boundary.

So much for the limits of the foreshore. Now let us turn to the rights enjoyed over the foreshore. The Crown's ownership is apparently a beneficial ownership, subject to this, that the public have certain rights of fishing and navigation over the foreshore. This has been established in a number of cases, but the most lucid authority on this point is furnished by Lord Parker's judgment in the case of *FitzHardinge* v. *Purcell* (99 L. T. Rep. 154; (1908) 2 Ch. 139). After referring to the two cases of *Blundell* v. *Catterall* (*sup.*) and *Brinckman* v. *Matley* (91 L. T. Rep. 429; (1904) 2 Ch. 313), his Lordship said: "The effect of the two cases I have cited is that, subject to the public rights in connection with fishing and navigation, the Crown's ownership of the foreshore is a beneficial ownership." The learned judge went on to point out that no grant by the Crown could operate to extinguish or curtail those public rights except possibly in connection with such rights as anchorage, when there is some consideration moving from the grantee to the public.

The public have no right of bathing on the foreshore. This was established by the case of *Blundell* v. *Catterall* (*sup.*), where the defendant contended for a common law right for all the King's subjects to bathe on the foreshore, and to pass over it for that purpose on foot and with horses and carriages. In that case Mr. Justice Best, as he then was, in a dissenting judgment expressed strong views in favor of such a public right. "The right of bathing in the sea," said his Lordship, "which is essential to the health of so many people, is as beneficial to the public as that of fishing, and must have been as well secured to the subjects of this country by the common law." But the majority of the court were of another way of thinking. Mr. Justice Holroyd, Mr. Justice Bayley, and Chief Justice Abbott all delivered judgments negativing any such right. The judgment of Mr. Justice Holroyd is generally said to have been the finest judgment that learned judge ever delivered. The case completely disposed of the question, and nowadays no member of the public may bathe as of right in the sea, unless, of course, it be from a boat outside the limits of the foreshore.

It must be admitted that there was much in the view that the public ought to be held to have a right to use the foreshore for bathing purposes. There might be a custom validating such a practice. But a person enjoying himself under cover of a custom would not be a member of the public. That is to say, a custom to disport oneself on the lands of a private individual—there are many cases where customs of this nature have been upheld as valid—does not entitle any stray member of the public to join in the fun. He would be a mere trespasser.

Customs of this kind are strictly limited in point of the persons who may take advantage of them. Thus the inhabitants of a village, or the freeholders of a manor, or the fishermen resident in a particular district, may enjoy rights by custom over the land of a private individual. These cases are instanced by the dancing round a Maypole or by the holding of races. We are not aware of any reported case where persons have been allowed by custom to bathe. Perhaps in ancient times sea-bathing was not in vogue. In the late Georgian period and early Victorian period sea-bathing was even more in vogue than at the present day. But in those days it was looked upon, with almost superstitious regard, as a matter of health. Thus we see what Mr. Justice Best thought of it in the year 1821. Nowadays it is regarded as a very enjoyable pastime rather than as a kind of water cure. In pre-Georgian times it was probably not looked on as either enjoyable or beneficial. Hence possibly the silence concerning bathing in our old reports.

A so-called "public bathing place" is almost invariably one of two things. Either it is a place which some local body or authority has appointed for the use of the public, and which is on land leased to that body or authority by the owner of the foreshore, or it is a spot where the public bathe by tacit license of the owner.

There have been a number of authorities in recent years illustrating the limits of the rights of the public on the foreshore. Thus in *Llandudno Urban District Council* v. *Woods* (81 L. T. Rep. 170; (1899) 2 Ch. 705) it was held that the defendant could not use the foreshore for the purpose of delivering addresses on religious subjects. The learned judge, however, refused to grant an injunction as he considered the action wholly unnecessary, although the defendant was wrong in law. The plaintiffs were lessees of the foreshore. The learned judge pointed out that *primâ facie* they were entitled to treat every bather, every nurserymaid with a perambulator, every boy riding a donkey, and every preacher as a trespasser. This, of course, the plaintiffs could not do if there was any paramount right in the public, and the members of the categories of persons referred to by his Lordship had claimed and established a public right to do what they were doing on the foreshore. The case of *FitzHardinge* v. *Purcell* (*sup.*), to which we have already referred, is an authority that a man cannot shoot wild fowl from a boat when the foreshore is covered by the flood tide. Nor can the public use the foreshore for such purposes as storing oysters. This was decided in the case of *Truro Corporation* v. *Rowe* (87 L. T. Rep. 386; (1902) 2 K. B. 709).

In short, the rights of the public on the foreshore seem to be of a very limited character indeed. But the public may at any rate console themselves with this, that seldom is it worth the while of a private owner—who usually is the lord of the manor or some large landowner—to raise any objection to the use by the public of the foreshore so long as that user is reasonable. The truth is that the foreshore as an item of property is not a valuable possession. If some of the fruits of its ownership are of value, these fruits can usually be taken by the owner without preventing the public from using the foreshore for other purposes. Then there is always this further consideration, that very often the question of title is a doubtful one, and the establishment of title against some obscure member of the public is not an enterprise that any discreet landowner will readily undertake.

LAW TIMES.

## Cases of Interest

DOES A CHURCHMEMBER SWEAR?—The frailties of human nature were again recognized in Taylor *v.* States (Tex.) 197 S. W. 196, wherein the court said: "Appellant testified to the fact that deceased cursed him and used very vigorous language in connection with the swearing. T. was permitted to testify that about a year before the homicide deceased had joined the church, and therefore had not been guilty of swearing since. The court says he admitted this because deceased had joined the church. The inference could be deducted that therefore he did not swear. We are of opinion this testimony of Mr. T. was not introducible."

RIGHT OF ALIEN ENEMY TO VOTE STOCK IN DOMESTIC CORPORATION.—On the ground that the law of nations prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries, it was held in Robinson *v.* Premier Oil, etc. Co. (Eng.) [1915] 2 Ch. 124, reported and annotated in Ann. Cas. 1917C 227, that an alien enemy shareholder in a domestic corporation has no right to vote in an election of directors for the corporation. The court said: "The proposed exercise of the votes is for the purpose of obtaining the control and management or a large voice in them of a British trading company which owns amongst other things large property in the enemy's country, and that this may be to the detriment of the interests of this country and the advantage of the enemy cannot be doubted."

SENDING OF ANONYMOUS LETTER AS INCLUDING PERSONAL DELIVERY.—A Texas statute forbidding the sending of an anonymous letter reflecting on the integrity, chastity, virtue, good character or reputation of the person to whom it is sent was involved in Bradfield *v.* State (Tex.) reported and annotated in Ann. Cas. 1917C 696. Therein it was urged that the letter had not been "sent" within the meaning of the statute because it was personally delivered. The court disposed of this contention by saying: "In our opinion appellant's contention cannot be sustained. We think that the true construction of said article, and the undoubted intention of the legislature was, not only to make it unlawful for any person to deliver or cause to be delivered any such letter, as well as to send or cause it to be sent, and that where said Act says, said person so sending such letter, does not exclude but embraces one who delivers it or causes it to be delivered as well as one who sends or causes it to be sent."

DUTY OF TELEGRAPH COMPANY TO FURNISH CHANGE.—As a general proposition a common carrier must furnish change to a reasonable amount, due consideration being given to the particular circumstances of the case. This rule was extended to telegraph companies in Dale *v.* Western Union Tel Co. (N. Y.) 166 N. Y. 740, wherein it appeared that a recovery of damages was sought because of the refusal of a telegraph operator to accept a $10 or $5 bill in payment for a telegram tendered therewith. Applying the previously stated rule the court said: "In my opinion the rules which govern a technical 'tender' are wholly inapplicable to the case at bar, which I think must be governed by the duties of a public service corporation, analogous in this respect to that of a common carrier. . . . By analogy, then, to the case of a common carrier, I am of opinion that a public service corpora-

tion must be prepared to furnish change to a reasonable amount; such reasonableness with reference to amount, time, and place to be judicially determined."

RECOMMENDATION AGAINST MILITARY PROMOTION AS LIBEL.—A military officer is not, as a general rule, liable to a subordinate for acts in the furtherance of discipline so long as he acts within the scope of his duty and is not actuated by personal malice. Accordingly it was held in Gray *v.* Mossman, 88 Conn. 247, 90 Atl. 938, reported and annotated in Ann. Cas. 1917C 27, that a communication by a militia officer to his superior relating to the fitness of a subordinate for promotion was privileged and would not sustain an action for libel in the absence of express malice, the court saying: "In order to hold the defendant liable for publishing a privileged communication of that character, it was essential for the jury to have found that the defendant was actuated by malice in making the publication. In answer to an interrogatory the jury so found. Malice in this sense means that the defendant was actuated by an unjustifiable motive. We have searched the evidence in vain to satisfy ourselves that this conclusion could be reasonably reached from the evidence."

LIMITATION OF WOMAN'S CURIOSITY.—That there may be a limit to a woman's curiosity was judicially recognized in Smedley *v.* State (Ark.) 197 S. W. 275, in which case it appeared that the accused was convicted of seduction. The court refused to grant appellant's prayer for instruction, telling the jury, in effect, that if the prosecutrix consented to sexual intercourse either through passion or curiosity, even though there had been a promise of marriage, their verdict should be for the defendant. After some observations on the nature of "curiosity" the court said: "While it is generally supposed, at least among men, that the gentler sex are possessed of almost boundless curiosity, yet it has not hitherto been conceived or suggested by any author on criminal law, so far as the writer is aware, that a woman might be prompted to yield her maidenhood and sacrifice her virtue out of mere curiosity. Certainly, therefore, no such issue should be submitted to a jury to determine unless there was some evidence to justify it. In this case there was none."

LIABILITY OF RESTAURANT KEEPER FOR FOREIGN SUBSTANCE IN FOOD.—The extent of the duty of restaurant keepers to furnish wholesome food and the resultant liability upon their failure to do so was held to be foreign in the decision of the case of Jacobs *v.* Childs Co. (N. Y.) 166 N. Y. S. 798, wherein it appeared that the plaintiff, while a guest in one of the eating places maintained by the defendant ordered a piece of cake which was served wrapped in wax paper. The cake was baked and prepared by the defendant. The plaintiff removed the cover and while in the process of eating, bit upon a metallic nail which was concealed in the cake, and for the injuries resulting therefrom sought to hold the defendant liable. The court dismissed the complaint, stating that no case involving the precise point could apparently be found, and said: "The rule is well settled that exercise of care is only required to prevent accidents which are to be expected according to human experience, and it stands to reason that an injury due to a nail concealed in a piece of cake is one which ordinarily human forethought cannot foresee."

ADMISSIBILITY OF BENEFIT CERTIFICATE WITHOUT OTHER PARTS OF CONTRACT.—Apparently but few courts have passed on the admissibility in evidence of a benefit certificate without the other parts of the contract. This question was presented in Dechter *v.* National Council, 130 Minn. 329, 153 N. W. 742, reported and annotated in Ann. Cas. 1917C 142. Under a statute providing that "the certificate, the constitution and laws of the association, and the application for membership and medical examination signed by the applicant, shall constitute the contract between the association and the member," the court, in holding that the certificate only was admissible, said: "The certificate contained the obligation of the defendant. In fact it contained all the substantive terms of the contract. The application and medical examination contain representations and warranties, and the constitution and laws may contain material conditions. But usually no useful purpose would be served by arbitrarily requiring that plaintiff make proof of these documents as part of his prima facie case. If the representations are true and the warranties and conditions are fulfilled they become unimportant. If any representation is false the burden is on the defendant to prove the falsity, and if any warranty or condition is not fulfilled the burden is on the defendant to prove the nonfulfillment."

LANGUAGE AS BREACH OF THE PEACE.—Bacon once said that "Discretion of speech is more than eloquence," and it might have been less disastrous to him if this had been observed by the appellant in Delk *v.* Com., 166 Ky. 39, 178 S. W. 1129, reported and annotated in Ann. Cas. 1917C 884. Therein it was charged that the appellant, while preaching to a large audience, used the following language: "Some men will stand around the depot, stores, the post office, and street corners, and watch the women pass, and size them up; the foot, ankle and form, and they would be willing to give five dollars for the fork." In holding that these words constituted a breach of the peace the court said: "It will be observed that the term 'breach of the peace' is quite broad, and includes not only all violations of the public peace or order, but acts tending to the disturbance thereof, including acts of public turbulence or indecorum, in violation of the common peace and quiet. Applying this definition to the nasty and obscene words used by appellant, we are of opinion they come within the definition, and constituted a breach of the peace. There was no possible excuse for the use of such language in the pulpit, or elsewhere; and that fact alone is sufficient to incite all right thinking persons to indignation, if not violence."

HOME DEFENSE GUARDS AS MILITARY BODY.—The Long Beach Defense Guards made an application for a certificate of incorporation under the New York Membership Corporations Law, and in disapproving the application Cropsey, J. in Matter of Long Beach Defense Guards, 100 Misc. (N. Y.) 587, said: "A further objection approving this certificate is found in section 241 of the Military Law as last amended by chapter 564 of the Laws of 1916. That provides that: 'No body of men other than the active militia and the troops of the United States except such independent military organizations as were on the twenty-third day of April, eighteen hundred and eighty-three, and now are, in existence, and such other organizations as may be formed under the provisions of this chapter, shall associate themselves together as a military company or organization.' And the section contains the further injunction that 'No body of men shall be granted a certificate of incorporation under any corporate name which shall mislead, or tend to mislead, any person into believing that such corporation is connected with or attached to the national guard or naval militia of this state in any capacity or way whatsoever.' The certificate in question plainly seeks to organize a military company. . . . The proposed name is also objectionable. The use of the word 'guards' coupled with the word 'defense' might be misleading, and tend to create the belief that the organization was connected with the national guard which essentially is a 'defense guard.'"

DISTURBANCE OF PATRIOTIC PARADE AS BREACH OF THE PEACE.—During a recognized state of war, the individual must subject

himself within reasonable bounds to the will of the majority as expressed through their government. This principle was reiterated in People *v.* Gleason, 166 N. Y. S. 711, wherein it appeared that the accused had, during a patriotic parade, distributed a number of pamphlets which stated in effect that the war was decreed by the "czars, kings and lords of the Money Trust"; that it was declared "for the maintenance and extension and exploitation," oppression, treachery, deception, robbery, murder, and destruction." It went on to state that the war is commanded by the blood-money accumulators and traitors of the country, who call upon people to sacrifice their honor and rights for the aggrandizement of their exploiters, oppressors, and enslavers, and the big crooks and money lords of the trusts, and that the people are to be sacrificed to the great Moloch and the glory of the Devil; and more to the same effect. In holding him guilty of a breach of the peace, the court said: "As these documents were circulated by the defendant at a time of great public excitement, shortly after the declaration of war, and as the pamphlet contained gross abuse directed against the course of the nation and against those responsible for that course, and was circulated at a place where a demonstration in support of the course of the nation was being had, in my judgment the magistrate was justified in finding that the act had a tendency to cause a breach of the peace."

OCCUPATONAL NEUROSIS AS INJURY WITHIN WORKMEN'S COMPENSATION ACT.—The various Workmen's Compensation Acts are generally considered as applying only to industrial conditions and not to the gradual breaking down or degeneration of tissues caused by long and laborious work. On this principle it was held in the case of In re Maggelet (Mass.) 116 N. E. 972, that no recovery could be had by a cigar maker for physical disabilities caused by the posture which his occupation compelled him to assume, the court saying: "No case has gone so far as to hold that a 'neurosis of the nerves' supplying certain muscles, resulting from a posture which causes the employee 'to bend with shoulders forward' so as to induce 'pressure on the brachial plexus' is a personal injury. . . . A nervous condition dependent upon poor posture of the body in our opinion does not constitute a commonly known and well recognized personal injury consequent upon employment. It is difficult to establish and define a plain line of division between what is personal injury within the act on the one hand and simple disease on the other hand. But personal injury and disease are not synonymous. They are different meaning. One does not include the other. They are classifications differing from each other in kind, although they may overlap in some instances."

DISEASE AS EXCUSE FOR BREACH OF PROMISE TO MARRY.—The presence of an incurable disease as an excuse for a breach of promise to marry was considered in Parsons *v.* Trowbridge, 226 Fed. 15, reported and annotated in Ann. Cas. 1917C 750, in which case it appeared that a suit was brought against the executor of one O. for a breach of promise to marry on the part of the latter. In defense it was contended that O. at the time of the alleged breach was suffering from an incurable disease called pernicious anemia, which made it impossible for him to consummate the marriage relation, and that he did not know of the disease at the time of the alleged promise. In affirming a judgment for the plaintiff the court approved a charge of the court below as follows: "If it be a fact that Mr. Oldfield had a disease known as pernicious anemia, as illustrated by the testimony in this case, it would not be a sufficienct excuse on his part for not carrying out the contract and having the ceremony performed. But if he had pernicious anemia, and believed that it would be fatal after a year or so from such time, you would have a right to consider that upon the question of amount of damages. Under the testimony offered, if he had pernicious anemia, which would be reasonably certain to bring about death within several months or a year, or something like that, she would have his society for such shorter time and would be entitled to recover a lesser amount. So you will consider the testimony with reference to pernicious anemia as bearing upon that phase of the case and that only."

MEDICAL PREPARATION AS INTOXICATING LIQUOR.—Medicinal and toilet preparations recognized as such by standard authorities, generally used as medicines and not reasonably capable of use as intoxicating beverages, are not usually regarded as within the meaning of the expression "intoxicating liquors." This doctrine was affirmed in Geer Drug Co. *v.* Atlantic Coast Line R. Co., 104 S. C. 207, 88 S. E. 448, reported and annotated in Ann. Cas. 1917C 908, wherein was involved a consideration of a preparation called "Pabst Malt" the court saying: "The case was tried without a jury on an agreed statement of facts, the essentials of which are: The malt is a medicine, prescribed by reputable physicians as a medicine. That it is manufactured and sold as a medicine, and contains no more alcohol than is necessary to hold the medicinal agent in solution. That it is prescribed for women, particularly in the 'lactated period.' It is sold as 'Best Tonic,' and complies with the United States law as to pure drugs, and is not subject to internal revenue tax. That it contains not more than 5 per cent. of alcohol. The case was tried on the agreed statement of facts without a jury, and judgment was rendered for plaintiff for the possession of the malt, on the ground that it is not an 'intoxicating liquor' within the statute. It is alleged, and not denied: 'That, owing to its composition, it will be impossible for any person to become intoxicated by its immoderate use, for the reason that said person would become sick long before he becomes intoxicated.' This statement being made and not denied, it becomes a fact in this case, and we must hold that it is not within the statute."

VALIDITY OF FEDERAL RESERVE ACT.—The Federal Reserve Act of Dec. 23, 1915 (Fed. Stat. Ann. 1912 Supp. p. 260) authorizes the Federal Reserve Board by sec. 11k thereof (Fed. Stat. Ann. 1912 Supp. p. 272) "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds, under such rules and regulations as said board may prescribe." This section was held unconstitutional in People *v.* Brady 271 Tex. 100, 110 N. E. 864, reported and annotated in Ann. Cas. 1917C 1093, on the ground that it was an attempt to regulate a matter which is within the exclusive jurisdiction of the state, the court saying: "Since Congress has no express or implied power to create trust companies to act as trustees, executors or administrators, the nature and character of their business making them the creatures of the various states, Congress could only vest national banking corporations with such powers if they were reasonably necessary to the efficiency of such corporations for the purposes of their creation as governmental agencies. If Congress had deemed the exercise of trust powers by national banks necessary to the accomplishment of the governmental purposes for which they were created it would seem such power would have been granted expressly to all national banks, as was the power to exercise certain banking functions granted by section 5136 of the Federal statutes. The right of a national bank to act as trustee, etc., as conferred by the Federal Reserve Act, was made elective with the bank. This feature of the act would preclude the conclusion that Congress deemed it necessary, on any ground, that national banks possess the power to act as trustees, executors, administrators or registrars of stock and bonds. If it had, it is evident it would not have made the act elective and permissive."

FALL FROM SCAFFOLD BY EPILEPTIC AS ACCIDENT ARISING OUT OF EMPLOYMENT.—That a person injured by a fall from a scaffold while at work, due to an epileptic fit, was not injured by an accident arising out of his employment so as to make his employer liable under a state Workmen's Compensation Act was the holding in Gorder *v.* Packard Motorcar Co., (Mich.) 162 N. W. 107, wherein the court through Fellows, J., commenting on various English authorities said: "The case most relied upon by the claimant is that of Wilkes (or Wicks) *v.* Dowell & Co., 7 W. C. C. 14, decided in 1905. In this case the facts were as follows: The workman was employed in unloading coal from a ship by means of a bucket attached to a hydraulic crane. His duty was to stand upon a stage which was made so that he could look down the hold and to give signals to the cranemen and to guide, by means of a long staff with a hook, the bucket which was raised from and lowered into the hold by the crane. He was subject to fits, and while standing on the stage engaged in his work he was seized with a fit and fell into the hold and was severely injured. The county court judge held that the injuries sustained by the workman were not caused by an accident arising out of his employment. Upon review this holding was reversed. The English statute contains the same provision as does ours, and we are unable to distinguish this case in principle from the instant case or the two later English cases to which we shall refer, with the one exception which we do not regard as controlling, but which might have been so regarded by the English court, as we shall presently see, and that is the fact that the workman in the Wicks case was in a place of extreme hazard, styled by Collins, M. R., as 'necessary proximity to the precipice.' If this case should be followed the board was correct. But the force of this case is materially minimized by two later holdings of the English court which are incompatible with it, Butler *v.* Burton-on-Trent Union, (1912) 5 B. W. C. C. 355, and Nash *v. The Rangatira,* (1914) 3 K. B. 978. In the Butler Case the deceased was master of a workhouse. While sitting at the top of some stairs leading up to his private rooms he was seized with a fit of coughing which made him giddy. He fell down the stairs, receiving an injury resulting in death. He was at the time suffering from tubercular trouble. It was held that the injury did not arise out of his employment, and that there was no liability, although it arose while deceased was in the course of the employment; that both must concur. The Nash Case arose under the following circumstances: Deceased went on shore with leave while the *Rangatira* was lying by the quay. He returned intoxicated about 11:15 P.M. and attempted to mount the gangway, which was properly constructed, and when about halfway up let go with one hand, and, swinging around, fell over the other rope on to the quay, receiving injuries from which he died the next day. It was held that the man had returned and was in the sphere or ambit of his employment, and therefore in the course of his employment, but that the accident was caused by his condition, and hence the injury did not arise out of his employment. The Butler and Nash Cases will therefore be seen not to be in accord with the earlier case of Wicks *v.* Dowell & Co. In the Wicks Case the deceased fell in an epileptic fit; in the Butler Case the deceased fell in a fit of coughing producing giddiness; in the Nash case the deceased fell while his mental faculties were dulled by intoxication. Upon principle we cannot distinguish these cases, and therefore feel that the strength of the Wicks Case is materially lessened, if not overruled, by the two later cases. . . . Our own cases clearly recognize the rule that in order to render the employer responsible there must be a concurrence of the two elements, viz.: (1) That the accident occurred in the course of the employment; and (2) that it arose out of it. If it did not arise out of the employment, but arose out of something else, the employer is not liable. . . . We must adhere to this construction of the statute, if any force or effect be given to the expression arising 'out of' the employment. The Legislature has so written the law and adopted the language of the English statute with the construction there placed upon it."

TOLL ROAD FRANCHISE AS AUTHORIZING EXACTING OF TOLLS ON AUTOMOBILES.—The construction of a toll road franchise granted in 1814 was in issue in Peru Turnpike Co. *v.* Town of Peru (Vt.), 100 Atl. 679, in a proceeding to condemn the location of the toll road. The franchise provided for a toll of fifty cents for a "four-wheled pleasure carriage drawn by two beasts," and when automobiles came into use the proprietor of the franchise made the same charge for automobiles. In determining the value of the franchise it was sought to have considered the amount received from automobiles, but the court refused the request on the ground that the franchise was not broad enough to cover automobiles, and it was further held that the fact that tolls for automobiles were charged and received did not establish a prescriptive right to charge. The court said: "The very question before us was presented in Mallory *v.* Saratoga Lake Bridge Co., 53 Misc. Rep. 446, 104 N. Y. Supp. 1025, and it is held that, under a charter authorizing the defendant to demand tolls not exceeding certain specified rates, one of which was for a 'wagon, cart or other carriage drawn by two horses,' an automobile was not subject to toll. Centre Turnpike Co. *v.* Vandusen, 10 Vt. 197, is in harmony with the foregoing cases. It was an action to recover a penalty for evading toll on the plaintiff's road. The charter of the company provided that a person who, with intent to evade payment of toll, left the road to pass a gate and again entered thereon, should incur a certain penalty. The defendant traveled the turnpike from Hancock to a point a few rods east of the tollgate in Ripton. There he left the turnpike and passed on over an open highway, and did not again enter the plaintiff's road. Upon these facts it was held that the plaintiff could only demand toll at the gate; that, no matter how far or how often a person traveled the turnpike, he could not be held for tolls unless he passed the gate; and that the defendant, not having passed the gate, and not having re-entered the turnpike, was not subject to the penalty, though his purpose was to evade toll. Regarding the proper construction of the charter, the court said: 'It must be construed so as to give effect to this intention of the legislature, but cannot be extended to a case unforeseen and unprovided for, and which, if it had been foreseen, it is, at least, doubtful whether any legislative provisions would have been made to prevent.' Nor can the charter before us be thus extended. The legislature failed to provide for the unforeseen condition which has arisen. That this condition was unforeseen does not admit of doubt. It must be remembered that we are not dealing with a situation existing more than a hundred years ago. Steam as a means of transportation was yet in the experimental stage; petroleum products were unknown; railroads were unprojected in the state, and none was chartered until years afterwards; canals were expected to furnish the principal means of heavy transportation. To say that the legislature of 1814 foresaw the advent of the automobile or any other mechanical carriage, and intended to provide for it in this charter, would be to ascribe to its members a prophetic vision that even those wise and far-seeing men could not possess. If they had, it is fair to assume that they would have added a general clause to the charter to manifest their purpose. The company places much reliance upon the Pennsylvania

cases. It is held in that state that a corporation authorized to engage in a business, as a necessary incident to that authority, has the rights ordinarily belonging to such business, and that compensation for services is inseparable from the right. Boyle *v.* Phila. & R. Co., 54 Pa. 310. In Geiger *v.* Perkiomen & Read. Turnp. Road, 167 Pa. 582, 31 Atl. 918, 28 L. R. A. 458, the question whether a bicycle was subject to toll was presented. In holding that it was, the court said that the method of computing tolls upon carriages by wheels and horses, as provided in the defendant's charter, was not the power to collect toll, but only a limitation of the amount chargeable. With this conclusion we cannot agree. It cannot be sustained on principle or authority. It is condemned in Murfin *v.* Detroit & Erin Plk. R. Co., 113 Mich. 675, 71 N. W. 1108, 38 L. R. A. 198, 67 Am. St. Rep. 489, in which case it was held that a bicycle was not tollable under a charter authorizing a toll on a 'vehicle drawn by one or more animals.' True it is that it is suggested in the opinion in this case that a motorcycle or automobile would be subject to toll, but this is wholly obiter."

## New Books

*Joseph H. Choate.* By Theron G. Strong: Author of "Landmarks of a Lawyer's Lifetime." New York: Dodd, Mead and Company. 1917.

Those who have read Mr. Strong's delightful book entitled "Landmarks of a Lawyer's Lifetime," a volume full of the atmosphere of the New York bar during the last half of the nineteenth century, are bound to pick up this volume with anticipation of an interesting evening, especially as it has to do with the principal incidents in the career of the best known lawyer of the period covered by Mr. Strong in his previous volume. The biography at hand does not purport to be complete, nor does it profess to be an authorized biography, therefore it does not allude to subjects domestic or social, But Mr. Choate and the author were contemporaries at the bar, and Mr. Choate placed at his disposal much valuable material consisting largely of clippings from the newspapers of this country and England preserved in several volumes of scrapbooks, and this together with material gathered from other sources, and incidents within Mr. Strong's own knowledge, has been so skillfully handled as to furnish the profession with a biography of Mr. Choate which is not only highly entertaining but instructive and stimulating as well. Carefully selected extracts from many of Mr. Choate's speeches show his splendid oratorical powers both on light and solemn occasions, and his abilities as a cross examiner in court are evidenced by references to the trial of the famous case of Laidlaw *v.* Sage.

The volume is broken up into four parts, namely, "The New Englander," "The New Yorker," "The Lawyer," and "The Ambassador."

In the chapter entitled "The New Yorker," we get the following word picture of Mr. Choate: "Possessing remarkable characteristics, association with him was always agreeable. He was never excitable, never ill-tempered, never appeared to be keyed up to make an effort. At all times placid and good-natured, there was also the bonhomie to which I have referred, with its graciousness, its light and delicate touch, its apparent proffer of intimacy. His friendly advances, cheerful comments, play of wit, approachableness, freedom from assumption, absence of all appearance of suspicion and distrust, made an immediate appeal, as though he were an old friend; the result being that he secured important advantages, and yielded nothing. Although the fortunate possessor of these outwardly attractive qualities, there was another side. The charm of his genial and gracious outward traits brought into more striking contrast certain inherited qualities which self-interest called forth in public affairs or professional employment. In his make-up there was a blending of the light and humorous, with firmness and dignity which, besides being unusual in combination, attracted men to him and protected him from them. He could be unimpressionable and unyielding; and it is well he could be so. In social intercourse, and in his public addresses, one saw only geniality and bonhomie; but beneath was the austerity of the New England Puritan. He was hard-headed and keen-witted. It was useless to attempt to take advantage of his apparent accessibility and friendliness, for, while one was welcome to roam in the vestibule of friendly association with perfect freedom, the approaches to more intimate relations seemed to bear the inscription: 'Thus far shalt thou go and no further.' With all his amiable and attractive outward qualities, which at once drew people to him, he knew how to keep them at arm's length. His tendency to make light of situations, and let loose his wit and ridicule, produced an impression of want of seriousness which interfered, ofttimes, with taking him seriously when he meant to be serious. When he arose to speak his audience generally expected a laugh. He at all times was easy-going, an advocate of the laissez faire principle, as if it were not worth while to raise issues or start controversies. He, therefore, seldom appeared as a leader in great public crises, or as a reformer of public abuses. In this he was unlike some of his associates who acted on their own initiative and were distinctively leaders and reformers."

Mr. Strong draws the following comparison between Mr. James C. Carter and Mr. Choate: "Mr. Carter, it is said, once remarked that giving Mr. Choate credit for an abundance of excellent qualities, there was lacking in his make-up capacity for moral indignation. This quality made Mr. Carter what he was, a leader and reformer. His moral indignation was aroused by evil tendencies which others failed to recognize in civic or professional affairs, and led him to act on his own initiative, and point out the way to much-needed reform in such a manner as to enlist co-operation. This capacity for moral indignation and consequent individual action was not so prominently developed in Mr. Choate's nature. But, because of this, he possessed the advantage of being able, calmly and dispassionately, to take a point of view affording a better perspective, and enabling him to form a more accurate judgment."

We would like to quote further from this most delightful volume, but space forbids. It is hoped, however, that enough has been said to arouse in the reader of this column a desire to possess it.

*Classics of the Bar.* Stories of the world's great legal trials and a compilation of forensic masterpieces. By Alvin V. Sellers. Volume 4. Baxley, Ga.: Classic Publishing Co. 1916.

This volume is of the same general character as earlier volumes which have been made known to readers of this column. Volume four contains addresses of counsel in various well known trials at law. Thus we have that of Lord Erskine in the action for damages for criminal conversation instituted by Rev. George Markham against John Fawcett, Esq. and tried before the Sheriff of Middlesex and a special jury at the King's Arms Tavern in Palace Yard, Westminster, on May 4, 1802. Another address is that of Daniel W. Voorhees at the trial of John E. Cook, one of the participants in the historic Harper's Ferry insurrection. Still another is that of Ben Hill in the case of the Government against William Gardner, who was tried in 1873 on a charge of violating one of the penal statutes of the United States. The important question was the validity of a rule of the federal court having

jurisdiction of the case respecting the selection of jurors. Coming down to more recent times we have the argument of Clarence Darrow in the Woodworkers' Conspiracy case, tried in Oshkosh, Wisconsin, in the year 1898. The appeal of Émile Zola, the eminent French novelist, who was tried for libel on account of his celebrated "J'accuse" letter to President Faure in 1898, is also contained in this volume. Mr. Sellers is performing well his task of preserving some of the forensic utterances which have attracted more than ordinary attention.

## News of the Profession

THE PROBATE JUDGES OF MINNESOTA met in annual convention at Owatonna, Minn., on October 1, 2 and 3.

DEATH OF WYOMING JURIST.—Judge Richard William Scott of the Wyoming Supreme Court died at Cheyenne, Wyo., on September 26, aged 59 years.

CHIEF JUSTICE OF INDIANA DEAD.—Richard K. Erwin, chief justice of the Indiana Supreme Court, died at Fort Wayne, Ind., on October 5, at the age of 57.

NAMED PROBATE JUDGE IN MISSOURI.—Governor Gardner of Missouri has appointed John A. Cooper, of Trenton, to the probate bench of Grundy county to succeed Judge G. T. Jackson, deceased.

APPOINTED COUNTY JUDGE.—H. Clay Garrett of Caruthersville has been appointed Associate Judge of the County Court of Pemiscot county, Missouri, to succeed Judge M. E. Dunavand, deceased.

FORMER NEW JERSEY JUDGE DEAD.—George Wakeman Wheeler, for thirty years a judge of the New Jersey Common Pleas Court, died at Hackensack, N. J., on September 20, aged 86 years.

WISCONSIN LAWYER DEAD.—M. A. Hurley, a leading Wisconsin attorney, and former president of the Wisconsin State Bar Association, died at Wausau, Wis., on September 25, aged 76 years.

MADE COUNTY JUDGE.—Harry J. Masters of Sparta, Wis., has been appointed county judge of Monroe county, to succeed Judge Richards, now a brigadier general in the United States army.

NEW CIRCUIT JUDGE IN MISSOURI.—Governor Gardner of Missouri has appointed John F. Lee of St. Louis to fill the vacancy on the Circuit bench caused by the resignation of Judge Rhodes E. Cave.

NAMED JUDGE OF PROBATE IN MINNESOTA.—F. R. Allen of Glencoe has been appointed judge of probate of McLeod county by Governor Burnquist of Minnesota, succeeding Judge Garfield Brown, resigned.

NEW SUPERIOR COURT JUDGE IN IOWA.—Governor Harding of Iowa has appointed Atherton B. Clark of Cedar Rapids to the bench of the Superior Court in that city, to succeed C. B. Robbins, resigned.

HEADS OHIO APPEAL JUDGES.—Judge Robert S. Shields of Canton has been elected chief judge of the Ohio Court of Appeals judges for the year 1918, succeeding Judge James I. Allread of Greenville.

APPOINTMENT OF FEDERAL JUDGE.—Charles F. Johnson, until last March a United States Senator from Maine, has been appointed United States Circuit Judge to succeed Judge William L. Putnam, resigned.

PIONEER IOWA LAWYER DEAD.—James Loring Carney, one of the pioneer lawyers of Iowa, and former president of the Iowa State Bar Association, died at Marshalltown, Ia., on September 19, aged 70 years.

AGED GEORGIA ATTORNEY DEAD.—Judge J. J. Martin, one of the oldest attorneys in Georgia, a Mexican War veteran, and former probate judge of Macon county, Alabama, died at Atlanta, Ga., on September 20, aged 91 years.

DEATH OF PROMINENT OHIO LAWYER.—David K. Watson, former attorney general of Ohio, congressman and assistant United States attorney for the Southern district of Ohio, died at Columbus, O., on September 28, aged 68 years.

MADE FEDERAL DISTRICT ATTORNEY.—John Robert O'Connor, for the past three years first assistant United States district attorney at San Francisco, has been appointed to succeed District Attorney Albert Schoonover, resigned.

APPOINTED TO POLICE BENCH.—Governor Stanley of Kentucky has appointed C. B. Anderson to succeed W. S. Stulce as Police Judge of Fleming, and W. G. Mitchell to be Police Judge of Wheelwright, succeeding D. F. Peak, resigned.

DEATH OF WASHINGTON JUDGE.—Robert Brooke Albertson, judge of the Superior Court of King County, Washington, since 1903, and formerly Speaker of the Washington legislature, died at Seattle, Wash., on October 3, aged 57 years.

WOMAN HEADS LAW DEPARTMENT.—Miss Mabel E. Witte, of Brooklyn, a graduate of Vassar College and of the New York Law School, has been appointed head of the new department of law instruction for women in Columbia University, New York city.

CHANGE IN MINNESOTA DISTRICT COURT.—Judge George W. Granger of Rochester has resigned from the district bench of the Third Judicial District of Minnesota, and Governor Burnquist has appointed Charles E. Callaghan of Rochester to fill the vacancy.

APPOINTED TO BENCH IN WEST VIRGINIA.—Henry S. Cato of Charleston has been appointed by Governor Cornwell of West Virginia to the bench of the circuit court of Kanawha and Clay counties, as successor to the late Judge Samuel D. Littlepage.

JUDICIAL APPOINTMENTS IN OREGON.—Governor Withycombe of Oregon has appointed George W. Stapleton and E. V. Littlefield of Portland to the bench of the Oregon Circuit Court to succeed Judges Gantenbein and Davis, who have entered the Federal military service.

FEDERAL JUDGE RESIGNS.—William L. Putnam, Presiding Justice of the United States Circuit Court of Appeals, First Circuit, has resigned from the bench on account of ill health. Judge Putnam is 82 years of age and has been on the Federal bench for a quarter of a century.

MICHIGAN PROFESSOR DEAD.—Professor Bradley Thompson, since 1887 professor in the law school of the University of Michigan, died at Ann Arbor, Mich., on September 30, at the age of 83 years. Professor Thompson retired as professor emeritus in 1913. He was a Civil War veteran.

DEATH OF NEW HAMPSHIRE JUDGE.—Chief Justice Robert N. Chamberlain of the Superior Court of New Hampshire died at Boston, Mass., on September 20, aged 57 years. He was appointed Associate Justice in 1904 and was named to succeed Chief Justice Robert G. Pike after the latter's death last January.

NEBRASKA JUDGE DEAD.—Monoah B. Reese, formerly chief justice of the Nebraska Supreme Court and dean of the University

of Nebraska law school from 1893 to 1904, died at Lincoln, Neb., on September 28, aged 78 years. Judge Reese was Grand Master of the Nebraska Grand Lodge of Masons in 1885 and 1886.

OHIO JUDICIAL APPOINTMENTS.—Governor Cox of Ohio has appointed Ernest M. Botkin judge of the criminal court of Lima to succeed Judge Emmet Jackson, now in military service. The governor has also named George J. Carew of Youngstown as judge of the court of domestic relations of Mahoning county, to succeed W. W. Zimmerman, resigned.

NEW JUDGES IN ARKANSAS.—Governor Brough of Arkansas has appointed John S. Lake of De Queen as judge of the Ninth Judicial District to succeed Judge Jefferson T. Cowling, deceased. Another recent appointment by Governor Brough is that of J. R. Baker of Heber Springs to the bench of the county court of Cleburne county to succeed Judge J. L. Bittle, resigned.

DEATH OF PROMINENT ATTORNEY AND MASON.—Judge Horace S. Maynard, 67 years old, former prosecuting attorney and mayor, and one of the most prominent Masons in Michigan, died at Charlotte, Mich., on September 22. Judge Maynard was grand lecturer for the last eleven years of Royal Arch Masons, chairman of the judiciary committee of the grand commandery, past grand high priest of the grand chapter of Michigan and past grand thrice illustrious master of the grand council of Michigan.

NEW MEXICO BAR ASSOCIATION.—The annual meeting of the New Mexico Bar Association was held at Roswell, N. Mex., on September 18, 19 and 20. Among the addresses delivered were the following: "Prussian Purposes," by John H. Atwood, of Kansas City; "Change of Venue by the State," by H. B. Holt, of Las Cruces; "What the Lawyer Should Do for the Bar Association," by O. L. Phillips, of Raton; 'What the Bar Association Should Do for the Lawyer," by H. M. Dow, of Roswell; "New Mexico Appellate Procedure," by E. B. Wright, of Santa Fe. Hiram Dow, of Roswell, was elected president for the ensuing year, and John R. McFie, of Santa Fe, was made secretary and treasurer.

MISSOURI BAR ASSOCIATION.—The thirty-fifth annual convention of the Missouri Bar Association was held at Kansas City, Mo., on September 27, 28 and 29. James H. Harkless delivered the president's address. Among other addresses were the following: "Railroads and Their Future," by Gardiner Lathrop of Chicago; "The Representative Idea and the War," by R. M. McElroy of New York; "To-day and Yesterday," by Frank Brumback of Kansas City; "The Writ of Certiorari," by Denton Dunn. At the annual banquet, United States Senator James E. Watson of Indiana was the principal speaker. The association unanimously adopted resolutions approving the action of the United States in entering the present war and condemning pro-German activity by pacifists in and out of Congress. The officers elected were as follows: President—James C. Jones, of St. Louis; secretary—George H. Daniels, of Springfield; treasurer—Dell D. Dutton; executive committee—A. Stanford Lyon, J. M. Lashly, James H. Harkless, James C. Jones, George H. Daniels, and Dell D. Dutton.

CALIFORNIA BAR ASSOCIATION.—The ninth annual meeting of the California Bar Association was held at Santa Barbara, Cal., on September 27, 28 and 29. The president's address was delivered by A. E. Bolton, of San Francisco, his subject being "Individuality of the Bench and Bar." Other addresses were as follows: "Settlement of Controversies between Citizens," by President Max Thelan of the California Railroad Commission; "The Unified Court," by Professor Orrin Kip McMurray of the University of California. Officers for the ensuing year were elected as follows: President—Frank H. Short, Fresno; Vice-presidents—Oscar C. Mueller, Los Angeles; J. W. Butler, Oakland, and Charles S. Cushing, San Francisco; treasurer—H. C. Wyckoff, Watsonville; secretary—T. W. Robinson, Los Angeles.; executive committee—Frank Short, T. W. Robinson, Bradner W. Lee, Los Angeles; Eugene Danley, San Diego; Walter Perry Johnson, San Francisco; A. H. Ashley, Stockton, and W. B. Bosley, San Francisco.

## English Notes*

THE TEMPLE DURING THE LONG VACATION.—The cloistral quietude of the Temple during the Long Vacation, so marked in normal years, was naturally more accentuated during the recent Vacation because of the war. So many of the younger men who in ordinary years stayed on for the weekly Vacation Court were in active service, and, with one or other of the libraries closed for some weeks, fewer even of the older members frequented the Temple. In a description of the Temple during the Vacation, Dickens, in one of those felicitous phrases in the coinage of which he had a peculiar knack, speaks of outer doors of chambers being shut up by the score, and messages and parcels directed to be left at the porter's lodge by the bushel. And indeed, this last summer, an examination of the notices affixed to certain doors might have offered some slight amusement to the careful observer. What in the language of the Law Digest compiler is known as a cross-reference was seen to be sometimes carried to extraordinary lengths. On chambers A a notice was found directing messages to be left at chambers B, but chambers B cross-referred to chambers C, where, again, a notice with the vague statement, "Back shortly," was all that rewarded the seeker after the information.

MR. GERARD'S TITLE OF NOBILITY—It is stated that Mr. Gerard, the late American Ambassador at Berlin, on whom the King has conferred the Grand Cross of the Order of the Bath, a decoration which carries the title of Sir, in recognition of his efforts to ameliorate the conditions incident to the incarceration of British prisoners of war in Germany, was offered the high honor last February, but was unable formally to accept it until his retirement from the American diplomatic service. To acceptance of a distinction of this character in the case of the holder of an office of profit under the Government of the United States the formal consent of Congress would be a condition precedent. The framers of the American Constitution had, as everyone knows, an intimate acquaintance not merely with the working of British political institutions, but with the trend of English society and the effect of the tone of that society on public life in the closing decades of the eighteenth century. They took the British Constitution as their model in the formation of the Constitution of the United States, and at the same time endeavored to eliminate from the new Constitution whatever appeared in their judgment to be the defects and drawback of its original. The very first article of the Constitution of the United States provides: "No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall without the consent of the Congress accept of any present, emolument, office or title of any kind whatever from any King, Prince, or foreign State." It is unlikely that Mr. Gerard will henceforth be known as Sir J. W. Gerard in America; he will probably not desire to be thus designated or addressed, just as the holders of the honorary degree of Doctor conferred by the universities are not usually designated or addressed as Doctor. The distinction will be to him of value as an acknowledgment of service in the cause of humanity, and as giving him precedence at the British Court. In 1904 the Grand Cross of the Victorian Order was conferred on the Archbishop of Canterbury and thereby

* With credit to English legal periodicals.

gave social precedence to his wife, who is not, however, designated or addressed by the titles of "Dame" or "Lady."

LORD BRYCE.—In selecting Viscount Bryce as chairman of the Parliamentary Committee appointed to consider the future position of the House of Lords, the Government has made an excellent choice. To his task Lord Bryce will bring an unrivalled knowledge of parliamentary and constitutional law and practice not only of our own country, but of that of other nations, in addition to an extensive practical experience of political affairs, for it will be remembered that he was a member of Mr. Gladstone's last Cabinet, and was one of the small committee which prepared the second Home Rule Bill. Moreover, being himself a distinguished member of the Upper House, he will approach the question to be considered by the committee in no unsympathetic spirit, for, although a strong Radical, he has never overlooked the value of a second chamber. In one of his lectures, speaking of the House of Lords, he refers to it as containing "among the fifty or sixty persons (out of nearly 600 members) who habitually attend its sittings not a few possessing intellectual power and practical experience, with (usually) some seven or eight distinguished lawyers, the flower of the Profession." Such a body may do excellent work for the commonwealth, and it is to be hoped that some means may be devised for perfecting its constitution so as to ensure still greater efficiency in its working. In addition to his work in the sphere of politics, Lord Bryce has also achieved distinction as an author. Not to every man is it given to become a classic in his own lifetime, but this happy fate has been Lord Bryce's. By his great treatise on the American Commonwealth, a work presenting a complete view of the subject in a style worthy of the theme, and by his earlier book on the Holy Roman Empire he has made his name familiar the wide world over and shown his wide grasp of historical and political questions and movements. Labors such as these, conjoined with his success as the English ambassador for many years at Washington have however rather tended to induce forgetfulness of the fact that Lord Bryce was for long a prominent member of the Bar. Indeed, he may now be counted as one of the veterans of the Profession. In those years immediately before his more complete absorption in politics he was best known as Regius Professor of Civil Law at Oxford, and as one of the Professors at the Inns of Court, but before he settled down as a teacher of law he was a practising member of the Bar. Incidentally, in one of his addresses on Roman Law as an intellectual study and as of practical value for the well-equipped English lawyer, he mentions that on one occasion in an appeal from the Court of Session he cited a passage from the Digest, a citation which, he says, was received with grave respect by our supreme appellate tribunal.

DEFICIENCY IN MILK FAT DUE TO MODE OF MILKING COW.—At a time when it is unavoidable that the price of milk should have attained the inflated height that it has—to give the wholesale and retail purveyors of that commodity the benefit of the doubt which most persons still entertain—its purity and quality are all the more absolutely essential to be insisted upon. Of much interest, therefore, is it to notice that extra vigilance is now being displayed in attempting to check offenses committed in breach of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63). Section 6 of that Act prohibits the sale of "any article of food . . . which is not of the nature, substance, and quality demanded" by the purchaser thereof. Whether the fact that there had been a sale of milk found on analysis to be deficient in milk fat to the extent of 13 per cent. was an offense within the mischief of that section, when such deficiency did not arise from any addition to or abstraction from the milk, but was solely due to the mode of milking the cow, was the question argued in the recent case of Grigg *v.* Smith. Under the Sale of Milk Regulations 1901, issued by the Board of Agriculture, where a sample of milk contains less than 3 per cent. of milk fat it is presumed for the purposes of the Act of 1875, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water. A deficiency amounting to four times the limit so defined was bound to be a matter calling for an information against the person offering the milk for sale. But, as appears from the facts of the case, it was owing merely to the circumstance that the cow had not been completely milked that the deficiency in milk fat occurred. There had been nothing added to or abstracted from the milk beyond the abstraction of impurities by straining. The justices found that the milk which was drawn last from the cow would contain more milk fat than that drawn earlier. Whether the milk could, notwithstanding its deficiency in milk fat, yet be regarded as "genuine" because it was offered for sale precisely in the natural state that it was when it came from the cow was the question that required determination. And had it not been for the decision of the majority of the full court, consisting of five learned puisne judges, in Hunt *v.* Richardson (115 L. T. Rep. 114; (1906) 2 K. B. 446), that question—of such general importance and difficulty that it is—would have created more trouble than it did. As it was, Hunt *v.* Richardson (ubi sup.) was very properly treated as an authority directly in point. Differences of opinion between the English and Scottish courts and among the English judges themselves have existed on this question. But they should now be dispersed, at any rate in England, since the decision in the present case, added to that in Hunt *v.* Richardson (ubi sup.), shows the view of six learned judges concerning it.

SECRET DIPLOMACY.—Mr. Balfour, speaking recently in the House of Commons as Secretary of State for Foreign Affairs, made use of an illustration in defence of secret diplomacy, which Mr. Bagehot half a century previously used in advocacy of open diplomacy. "There must," said Mr. Balfour, "be reticence and caution, and reticence necessarily involves that everything cannot be said. We all know in private life that if everything was said everywhere and by everybody domestic life would be impossible, and the domestic life of nations is quite as delicate and difficult to manage as the domestic intercourse and the relations between the different members of the human family." Mr. Bagehot comes to a directly opposite conclusion, relying on the self-same illustration. "A great deal," he writes, "of the reticence of diplomacy had, I think history shows, much better be spoken out. The worst families are those in which the members never really speak their minds to one another; they maintain an atmosphere of unreality, and everyone always lives in an atmosphere of suppressed ill-feeling. It is the same with nations. The parties concerned would almost always be better for hearing the substantial reasons which induced the negotiators to make the treaty, and the negotiators would do their work much better, for half the ambiguities in treaties are caused by the negotiators not telling the fact, or not taking the pains to put their own meaning distinctly before their own minds. And they would be obliged to make it plain if they had to defend it or argue on it before a great assembly." The public ignorance of foreign affairs, which is the inevitable result of a policy of secret diplomacy, was thus criticised by Mr. Austin Chamberlain, speaking with a Cabinet experience. On February 8, 1914, Mr. Chamberlain said: "I sometimes ask myself whether in the future it would not be necessary, and, indeed, if it would not be a good thing, that the Foreign Secretary should take the House of Commons in the first instance, and his countrymen at large in the second, much more into his confidence than he has done in the past. We have passed in

recent times through European crises the full gravity of which was not realized by our people, if realized at all, until after they had passed into history. I ask myself, can you conduct democratic government on these principles? Can you really think the whole of the people will rise to the height of a great emergency, when you come upon them, if there has been no previous preparation of their minds—if they themselves have been unable to follow the step by which you have been driven to the conclusion at which you ultimately arrive? And I wonder whether the time is not coming—whether, indeed, it has not come—when the House of Commons ought to have at least once every year such a reasoned review of our position in relation to world affairs as is accorded by the Foreign Minister of any other great State to the Parliament to which he is not more, but less, responsible than British Ministers are to theirs."

MARRIAGE UNDER A FALSE NAME.—The popular delusion, widespread as it apparently was, that for any one to marry under a false name—howsoever the ceremony might have been celebrated—did not ever invalidate the marriage must have been rudely shocked by the decision of the Court of Appeal, reversing that of Mr. Justice Bargrave Deane, in the recent case of Plummer *v.* Plummer. For although that may be perfectly incapable of contradiction in the case of a marriage by license, as in the present instance, yet it is clear, from what the learned judges had to say in the course of their judgments, that it is otherwise in the case of a marriage by banns. And the reason for the difference is that there is a great distinction as regards notice between the two methods of solemnizing a marriage. Thus, a wilful and fraudulent misstatement will invalidate a marriage by banns, despite what may have been conceived to be the law on the subject by those unfamiliar with the intricacies of that difficult branch. In more than one reported case it has been held that the words "due publication of banns" include a true statement of the names of the parties who intend to go through the ceremony of marriage. Why there should be this diversity of result was explained by Lord Cozens-Hardy, M. R., when he said that after the application for a license and before the marriage no publicity is necessary. That appeared to his Lordship to show that the principles which have been applied to marriages by banns or on notice without license ought to have no application to a case where the marriage takes place by license. Indeed, as was remarked by Lord Justice (then Mr. Justice) Swinfen Eady in Re Rutter; Donaldson *v.* Rutter, (97 L. T. Rep. 883; (1907) 2 Ch. 592): "Marriages in false names have been held valid in many cases of marriage by license." The learned judge cited as illustrations the cases of Holmes *v.* Simmons, (18 L. T. Rep. 770; L. Rep. 1 P. & D. 523, at p. 525) and Prowse *v.* Spurway (46 L. J. 49, P. D. & A.). That the reasoning applicable to the due publication of banns does not apply to the case of notice seems plainly established. In such a case, the provisions of the Marriage Act 1836 (6 & 7 Will. IV., c. 85) require (inter alia) a statement in the notice of the intended marriage of "the name and surname and the profession or condition of each of the parties intending marriage." And that has to be accompanied by a declaration confirming the correctness of the statements contained in the notice. A false name and declaration expose the person making the same to severe penalities for perjury. That is the consequence of wilfully giving the same, not the invalidation of the marriage, where a marriage by license is concerned. And seeing that the very object of a marriage by banns is information to all and sundry that the same is pending, whereas in the case of a marriage by license publicity is to be avoided, there is no difficulty in comprehending the grounds for drawing the distinction.

EXCESSIVE RAINFALL AND ESCAPE OF WATER.—Excessive rainfalls during the past two years lend peculiar interest to such cases as that of Corporation of Greenock *v.* Caledonian Railway Company (1917 W. N. 262), which came recently before the House of Lords. The corporation of Greenock constructed a pond on land acquired by them for the purposes of a public park, by intercepting and obstructing the course of a natural stream which they inclosed in culverts. Owing to a storm of unprecedented violence the pond overflowed, and, as the result of the interference with the course of the natural stream, a great volume of water which, apart from such interference, would have been carried off without mischief, damaged certain railway stations. The plea that the extraordinary storm of rain was *damnum fatale*, which the corporation could not have foreseen and for which they were not liable, was set up. The circumstances of the present case bear such a striking resemblance to those of Nicols *v.* Marsland (L. Rep. 10 Exch. 255; affirmed on appeal, 35 L. T. Rep. 725; 1 Ex. Div. 1) that the decision in that case—distinguishing that in the famous case of Fletcher *v.* Rylands (19 L. T. Rep.220; L. Rep. 3 E. & I. App. 330)—would certainly seem to govern the present one. It is desirable, therefore, to quote the principle which was so clearly pronounced by the Exchequer Chamber in Nichols *v.* Marsland (ubi sup.): One who stores water on his land, and uses all reasonable care to keep it safely there, is not liable for damage effected by an escape of the water, if the escape be caused by the act of God or vis major, e.g., by an extraordinary rainfall which could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented. In that case, ornamental pools containing large quantities of water had been formed on the defendant's land by damming up with artificial banks a natural stream which rose above the defendant's land and flowed through it. An extraordinary rainfall caused the stream and water in the pools to swell so that the artificial banks were carried away by the pressure, and the water in the pools, being thus suddenly let loose, rushed down the course of the stream and injured the plaintiff's adjoining property. But the defendant was held not to be liable for the damage for the reason heretofore enunciated. In the present case, five members of the House of Lords were unanimously of opinion that the damage was not in the nature of *damnum fatale*, but was the direct result of the obstruction of a natural watercourse by the works followed by a heavy rain. It was the duty of any one, said Lord Finlay, L. C., who interfered with the course of a stream to see that the works which he substituted for the channel provided by nature were adequate to carry off the water brought down by extraordinary rainfall, and if damage resulted from the deficiency of the substitute which he had provided for the natural channel he would be liable. The decision in Kerr *v.* Earl of Orkney (20 D. 298) was applied, while that in Nichols *v.* Marsland (ubi sup.) was stated to be distinguished. But for all the value which still remains in that decision, it might just as well have been candidly said to be unequivocally overruled as downright bad law.

BILLS OF EXCHANGE AND CONFLICT OF LAWS.—In the recent case of Guaranty Trust Company of New York *v.* A. Hannay and Co. the sellers of cotton in the United States drew in the States a draft on the English buyers of the goods for the price, and this draft contained in the margin the date of the sale contract and a reference to the quality of the cotton, and in the body there was a statement that it was for value received and that the amount was to be charged to the account of the cotton. This draft was bought in good faith by the plaintiffs, who were American bankers, and was sent, together with the bill of lading, which was forged by the shippers, to the defendant's agents in England, who accepted it and paid the amount to the plaintiffs. The defendants

subsequently sued the plaintiffs in America to recover the amount paid, and succeeded before the judge of first instance on the ground that by American law the draft was not a negotiable instrument but only a conditional order of assignment, and that therefore the defendants had all the remedies against the plaintiffs that they had against the shippers. The United States Circuit Court of Appeals, however, ordered a new trial on the ground that the matter fell to be decided by English law. The plaintiffs then sued the defendants in England, and claimed a declaration that they were under no liability, thinking that, as the matter was to be decided by English law, England was the most suitable and convenient place for trial. Now, if the draft had been issued in England and the question had had to be decided according to ordinary English law, the draft would have been a negotiable instrument, and there would have been no liability on the part of the plaintiffs to repay the money, for the defenses that the plaintiffs warranted and represented the genuineness of the bll of lading and that they undertook to indemnify the defendants against loss, failed on the authority of Leather *v.* Simpson (24 L. T. Rep. 286; L. Rep. 11 Eq. 398), as also did the defenses of mutual mistake and want of consideration. The question then arose whether section 72 of the Bills of Exchange Act 1882 threw the parties back on American law, and Mr. Justice Bailhache held that it did, America being the place of issue of the draft. The next question was whether by American law the draft was a negotiable instrument, or only a conditional order of assignment, in which latter case it was conceded that the defendants were entitled to recover on their counterclaim. After a careful review of the American decisions, which pointed both ways, and having some regard also to the fact that an American judge had already construed the document to be by American law a conditional order of assignment, the learned judge came to the conclusion that the document was not by American law a negotiable instrument, and the defendants were therefore entitled to recover back the amount which they had paid to the plaintiffs. The case is a very difficult and complicated one, and it is to be hoped, in view of its great importance to commercial men on both sides of the Atlantic, that it will be taken to the Court of Appeal for a further pronouncement. As the learned judge said, there are the soundest business reasons that the law in this regard should be the same in both countries, and it was apparently intended that it should be the same, as is evidenced by the adoption of the English Bills of Exchange Act 1882, in numerous American States.

GROSS NEGLIGENCE.—It is a common belief in the Profession that for civil purposes there is no difference between negligence and gross negligence; that, in the words of Baron Rolfe in Wilson *v.* Brett (11 M. & W. 115), negligence is the same thing as gross negligence, "with the addition of a vituperative epithet." That the question is not beyond all doubt, however, the recent case of Karavias *v.* Gallinocos shows. There the defendant gave his friend a gratuitous ride in his motorcar, and the friend was injured during the drive. The jury found that the defendant had not exercised due and reasonable care in driving, but that he had not been guilty of gross negligence. On these findings the defendant claimed to be entitled to judgment, the argument being that where the relationship of host and guest exists, or there is a gratuitous bailment, the defendant cannot be liable unless guilty of negligence of a high degree. In Beal *v.* South Devon Railway Company (3 H. & N. 342) Mr. Justice Crompton said: "What is reasonable care varies in the case of a gratuitous bailee and that of a bailee for hire," though he also said that "the failure to exercise reasonable care, skill, and diligence is gross negligence." In Giblin *v.* McMullen (21 L. T. Rep. 214; L. Rep. 2 P. C. 317) it was held that a bank, who was a gratuitous bailee, was not bound to exercise more than ordinary care of the deposits entrusted to it. In Moffat *v.* Bateman, another Privy Council case (22 L. T. Rep. 140; L. Rep. 3 P. C. 115), where the facts were similar to those in the present case, it was said by Lord Chelmsford that in the absence of any evidence of gross negligence the defendant was not liable. Coughlin *v.* Gillison (79 L. T. Rep. 627; (1899) 1 Q. B. 145) also suggests that in the case of a gratuitous bailment gross negligence is necessary to render the bailee liable. On the other hand, in the most recent authority, Harris *v.* Perry (89 L. T. Rep. 174; (1903) 2 K. B. 219), the Court of Appeal held that where one man is giving another a gratuitous ride, he is liable if he does not take reasonable care. There there was a finding that the defendant was negligent, but no question was put to the jury as to whether the defendant was guilty of gross negligence. That case, therefore, lays down that a want of reasonable care renders the defendants liable, but it did not deal directly with Moffat *v.* Bateman (sup.), nor did it decide in so many words that a defendant is liable even though he has not been guilty of gross negligence. The position is, therefore, that in 1869 the Privy Council held that gross negligence was essential, while in 1903 the Court of Appeal held that an absence of reasonable care made the gratuitous driver liable. In view (inter alia) of the facts that Moffat *v.* Bateman was cited in the arguments in Harris *v.* Perry, and that the actual decision in Moffat *v.* Bateman was that there was no evidence of negligence of any sort, Mr. Justice Avory felt bound to follow Harris *v.* Perry, though he suggested that, in the present state of the authorities, the point was fit for the Court of Appeal. We think that an appeal, though of considerable interest to lawyers, would be likely to prove of little benefit to the appellant, for it seems probable that the Court of Appeal would approve the decision of Mr. Justice Avory.

"COMMON EMPLOYMENT" AND VOLUNTEERS.—It is not an uncommon belief in the Profession that the doctrine of "common employment" is long since dead and buried. Its application has, it is true, been considerably limited by legislation, notably by the Workmen's Compensation Acts, but otherwise "the rule," as Mr. Justice Neville said in the recent case of Hayward *v.* Moss Empires Limited, "though a purely arbitrary and artificial rule, founded upon neither principle nor (prior to 1837) authority, is to-day established beyond question, and cannot be disregarded by the courts." In that case the plaintiff, a professional dancer, attended rehearsals for a revue, and was injured by the negligence of a servant of the defendants, the producers of the revue. She was under no contract with the defendants, and attended the rehearsals merely in the hope of securing an engagement to perform in the revue. The defendants said that she should be treated as a person in common employment with the negligent servant, but as she was under no contract, and was not bound to obey any person's orders, that contention in Lord Reading's view, failed. Then it was said that she was a volunteer, and so could not recover. In Potter *v.* Faulkner (5 L. T. Rep. 455; 1 B. & S. 800) Chief Justice Erle said: "This is the case of one who volunteers to associate himself with the defendant's servant in the performance of his work, and that without the knowledge of the master. Such a one cannot stand in a better position than those with whom he associates himself in respect to their master's liability; he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ." In Degg *v.* Midland Railway Company (1 H. & N. 773) a man was voluntarily assisting the defendant's servants in turning a truck when he was killed by the negligence of other servants of the defendants, and it was held that his administratrix could not recover. In that case and in Potter's case the injured person had of his own initiative volunteered to assist, and was on the

defendant's premises as a licensee, and had no interest of his own. In Holmes *v.* North-Eastern Railway Company (24 L. T. Rep. 69; L. Rep. 4 Ex. 254) the plaintiff was the consignee of coal, and, with the permission of the station-master, went to a wagon and took some of the coal from it. In so doing he slipped on the flagged path, which gave way, and he was injured. It was held that he was entitled to recover. That decision was followed in a similar case, Wright *v.* North-Eastern Railway Company (33 L. T. Rep. 830; 1 Q. B. Div. 252), Lord Coleridge observing: "The plaintiff was not acting merely as a volunteer, in which case he would have been bound to take all risks upon himself, nor was it the case of master and servant, in which case the defendants would not have been liable for the negligence of a fellow-servant. But, being bound by contract to deliver the heifer to the plaintiff, they allowed the plaintiff to take part in the delivery, and were bound to see that he did not get injured by the negligence of their servants." The question in the present case was whether it fell within Degg's case and Potter's case or within Holmes' case and Wright's case; and it was held to fall within the latter. The plaintiff was attending the rehearsals in her own interest as well as in the interests of the defendants; her primary object was her own advancement, the prospect of obtaining an engagement; she was there with the defendant's consent, and was not a mere intermeddler, licensee, trespasser, or volunteer, and therefore, as the Court of Appeal, affirming Mr. Justice Shearman, held, was entitled to recover.

"Preventing" or "Hindering" Execution of Contract.—Although the expressions "to prevent" and "to hinder," or "preventing" and "hindering," are popular ones to employ in a certain class of mercantile contracts, yet decisions of the courts as to their meaning or application are singularly scant in number. The word "preventing" is, however, much more common in exception clauses than "hindering." A discussion of how a party to a contract may be "prevented" from completing it is contained in the judgment of Chief Justice Campbell in Cort *v.* Ambergate Railway (17 Q. B. 145, at p. 146). And in United States *v.* Pelly, (47 W. R. 332), it was shown how a contract, legal in its inception, might be "prevented" from being fulfilled by its becoming contrary to law. The words "preventing the loading" in a charter-party were dealt with by Barron Pollock in Coverdale, Todd, and Co. *v.* Grant and Co. (46 L. T. Rep. 632; 8 Q. B. Div. 600, at p. 602; on appeal, 48 L. T. Rep. 701; 11 Q. B. Div. 543; 51 L. T. Rep. 472; 9 App. Cas. 470). So, the very similar phrase "prevent or delay loading" came up for consideration in Scotland in the case of Arden Steamship Company *v.* Mathwin and Son (1912, S. C. 211). Turning to even more recent authority, there was the decision quite a short while ago of the Court of Appeal in Veithardt and Hall Limited *v.* Rylands Brothers Limited (116 L. T. Rep. 607) that the present war was not among the "unforeseen hindrances preventing execution in due time" of the contract that had to be construed in that case. "Hindrance" was likewise used in Crawford and Rowal *v.* Wilson, Sons, and Co. (1 Com. Cas. 15, 277). But the most useful of all modern dissertation as to the right application of "preventing" and "hindering," or of any synonym of those words, occurred in the case that came before the Court of Appeal last year of C. S. Wilson and Co. Limited *v.* Tennants (Lancashire) Limited (114 L. T. Rep. 878; (1917) 1 K. B. 208), the decision of which court has only just lately been reversed by the House of Lords: (see 116 L. T. Rep. 780). The definition of those expressions was fully gone into in the dissentient judgment of Mr. Justice Neville in that case. And the absence of evidence of any technical or special meaning being attached thereto was remarked upon by his Lordship. The exposition by the learned judge of the various ways in which they are employed in modern times will probably always be found useful when they have to be construed in legal instruments. And the circumstance that it was his dissentient judgment—and not those of his learned colleagues—that met with the approval of six out of the seven noble and learned Lords who had to determine that case in the House of Lords is significant. For it gives complete assurance that the construction which was placed by him upon the phrase "or otherwise preventing or hindering the manufacture or delivery of the article," which appeared in the conditions of sale there, is the right one. A diminished supply of the commodity agreed to be delivered was the result of the outbreak of the war. The House of Lords accordingly came to the conclusion that the shortage arising from the war hindered, although it did not prevent, delivery within the meaning of the condition. It was, moreover, held that a mere rise in price was not a prevention or hindrance. So that much further instruction as to the true meaning of the words in question is deducible from the present case.

## Obiter Dicta

August 1, 1914.—Kaiser *v.* Idleman, 57 Oregon 224.

Turning the Tables in the World's Series.—Benton *v.* Winner, 69 Hun 494.

Had To Be Sly.—In Standard Oil Co. *v.* Slye, 164 Cal. 435, the defendant won.

In the Cups.—Weinhandler *v.* Colonial Brewing Co., 32 Misc. (N. Y.) 731; Drinkhouse *v.* German, 17 Cal. App. 162.

Nearly Apropos.—Sipe *v.* Alley, 117 Va. 819, was an action for a mandatory injunction to compel the opening of a street.

Talking in the Clouds.—"The amount of money one owns makes not the man or the woman."—Per Miller, J., in Sorrel *v.* State, 74 Tex. Crim., 100.

The Fatal "D."—"This case presents a tangled skein, the constituent threads of which are divorce, death and dollars."—Per Lumpkin, J., in McLeod *v.* McLeod, 144 Ga. 359.

The Strength of the Weak.—In W. S. Brown Mercantile Co. *v.* Yielding Bros. Department Store, 76 So. (Ala.) 4, the defendants won despite the fact that the attorneys against them were Harsh, Harsh and Harsh of Birmingham, Ala.

The First Circuit Judge.—"And Samuel judged Israel all the days of his life. And he went from year to year in circuit to Beth-el, and Gilgal, and Mizpeh, and judged Israel in all those places." 1 Samuel vii, 15–16.

Euphemistically Speaking.—"Bill Burdette had formerly been a resident of Kansas, and while there placed a *pretium affectionis* on a set of harness; and in consequence of its informal appropriation, he was for a time forcibly secluded from ordinary social intercourse." See State *v.* May, 142 Mo. 140.

In Accordance with the Modern Conception.—"To allow the usages of Wall Street to control the general law in relation to any matter, might result in the establishment of principles not always in accordance with sound morals." Per Senator Wright in Dykers *v.* Allen, 7 Hill (N. Y.) 501, decided in 1844.

Going Some.—A negro was on the stand in an Alabama courthouse testifying to the details of a shooting scrape, says the Chicago *News*. The witness told how the prisoner at the bar drew a revolver and began firing at one Jim Henry, and how Jim Henry ran to save himself. "You say Henry ran?" interjected the lawyer for the defense. "Dat's whut I said." "You are sure he ran?".

"Sho' is!" "Well, did he run fast?" "Did he run fa— Say, boss, ef dat nigger had 'a' had one feather in his hand he'd 'a flew."

AN UNWILLING WINNER?—In Western Union Tel. Co. *v.* McLaurin, 108 Miss. 273, an action to recover damages from the telegraph company for disclosing the contents of certain telegrams sent to the plaintiff, it appeared that the plaintiff had suffered considerable shame and humiliation because by virtue of the disclosure his relations with a woman of the underworld became public property. Among other interesting remarks about the facts made by the court in its opinion, was the following: "It may be suggested that had the disclosures not been made, in all probability, appellee would have continued to stray in the primrose paths of dalliance; whereas and since the 'blessed sunlight of publicity' has caused him to abandon the pleasures of sin, appellee is in fact the winner rather than the loser; but as the telegraph company does not file this as an offset we will not consider that feature of the case.'

VALUE RECEIVED —A awyer in Texas who is not very long on English, recently was admitted to the bar, and one of his first opinions to a client on a land title closed with the following comprehensive language: 'As a result of this examination I advise you that when you have gotten all pertinences and wrights in due form by a general warrant and deed, that you will have a good merchantable fee simple tail title to the land. The deed should be signed by the wife as joint performer with her husband. I have already acknowledged receipt of the $50 00 fee you paid me. Thanking you for this business and asking a continuance of the same, I am, Yours respectfully, ————."

DWELLING TOGETHER IN UNITY.—In Fox *v.* Nelson, 30 N. Dak. 589, Bruce, J., wrote the prevailing opinion. Christianson, J., wrote a dissenting opinion. Then Goss, J., wrote a concurring opinion, after which Christianson, J., further dissented, prefacing his remarks as follows: "Since the foregoing dissent was prepared, a concurring opinion has been written by Justice Goss for the conceded purpose of discussing the dissenting opinion. This procedure is, to say the least, somewhat anomalous, as I believe the books will be searched in vain for another instance where a majority has found it necessary to defend its decision, and I sincerely hope that this procedure will not be deemed a precedent to be followed by this court in the future. This extraordinary proceeding is of itself an admission of the weakness of the conclusions reached by the majority members, and a confession on their part that their former opinion needs defense. I shall not attempt to go into any extended discussion of the concurring opinion, as the opinion itself is a sufficient refutation of its contents."

A CHAMELEONIZED MULE.—In Lindsey & Co. *v.* Steenson, 192 Ala. 169, an action involving the identity of a mule, the court said: "The chief controversy, however, was with respect to the color of the defendant's mule, and the color of the mule mortgaged to plaintiff. Plaintiff himself describes his mule in the mortgage as a bay mule; in a note written to defendant in December, 1911, he claims to have a mortgage on 'the John Cooper black horse mule'; and in his complaint—with prudent forebodings, perhaps—he calls him simply a 'dark' mule. A number of witnesses testified as to the color of the two mules—or of the one mule, if the two are but one—and it appears that the mule's most intimate acquaintances are in hopeless disagreement as to his real color. Speaking of the mule in suit, some describe him as bay, some as dark bay, and some as black. To quote a few opinions: Will Cooper: 'I called this a black mule. Some seasons he was lighter than others. He would change sometimes.' Charles Heflin: 'That mule was a dark bay mule. He did not change color while I had him.' W. E. Finney: 'That mule was a bay mule.' D. Stephenson: 'He was bay part of the time. He was almost black when he shed off. I do not think it could be considered a bay mule.' Dee Almon: 'The mule is what I call a bay mule.' J. Steenson: 'Its color was black; I called it a black mule.' J. Smith, R. Pickens, and J. C. Kumpe: 'He is black.' W. Steenson: 'It was a bay horse mule named Jack.' "

FILTERED CHARITY.—In Matter of Dart, 172 Cal. 47, the court, discussing an ordinance prohibiting the soliciting of funds for a private charity without a permit from the municipal authorities, made the following caustic remarks: "Charity is not only to begin at home, but to end at home, saving as under 'permit' it may be suffered to go abroad. The quality of mercy (and so necessarily of charity) we are told

> —'is not strained:
> It droppeth as the gentle rain from Heaven
> Upon the place beneath.'

But in Los Angeles it is to be strained, and drop as from a sprinkling-pot in the guiding hand of the Charity Commission. . . . Money may be freely sent abroad by any 'established church' for the uplift of the soul of the Senegambian, and this is very well; but no penny can be sent to Belgium, to Poland, to Serbia, to still the wailing of the children, or allay the anguish of the women, except under a 'permit' from the Charity Commission. Nay, more, in the city of Los Anglees itself, its needy childhood goes unfed and unclothed, its dependent womanhood unprotected and uncared for by organized charities except they have a 'permit.' Surely here if anywhere is

> 'The organised charity, scrimped and iced
> In the name of a cautious statistical Christ.' "

THE MAGIC HATS.—We are indebted to a correspondent for the following truthful and hitherto unpublished account of a verbal "set-to" which occurred a few years ago between two of the Supreme Court Judges in the Eighth New York Judicial District—the late Justices Childs and Ward. Judge Childs was of modest but dignified, even severe demeanor, while Judge Ward (who by the way was the recipient of Governor Hill's "I am a Democrat still—very still" message, was much given to sparkling badinage and was a *bon vivant* in the best and finest sense of the term. Both wore the conventional "plugs." One afternoon on leaving chambers, Judge Ward inadvertently, or more likely by design, walked out with Childs's hat, who of course was compelled to wear Ward's. The following morning the latter walked into chambers and greeting Childs already there, said, as he quizzically surveyed the hat: "Judge, there's something mysterious about this hat. As I was coming down Main street this morning I had a strange experience. My head began to swell, I conceived the most exalted opinion about myself and was suffused with a glow of self-satisfaction and esteem. I am convinced that there is swelled head self-mythomania in this magic hat." Judge Childs, never smiling, and holding up Ward's hat to close scrutiny, said: "Well, Judge, I too had a strange and unusual experience this morning. As I

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was coming down Main street, I felt transfigured and transformed. A multiple personality seemed to assert itself. I seemed no longer a judge. I thought myself a gallant, a Brummel, a Nash, a Chesterfield and a Lothario all in one, and prompted by an irresistible and uncontrollable impulse, I raised my hat to every pretty woman I met." For once the laugh was on Judge Ward.

RATS.—We hereby cordially welcome the Georgia rat into the menagerie department of this column. In the comparatively recent case of Lumpkin *v.* Provident Loan Society, 15 Ga. App. 816, Judge Broyles discoursed so entertainingly about rats that we feel impelled to quote his remarks at some length for the edification of our readers. The action was to recover rent, and the defendant pleaded in defense that the premises were untenantable because of rats. Said the court: "The whole trouble of the plaintiff in error can be summed up in one word—rats! It is true that the evidence discloses that the office was badly ventilated, and one witness for the defendant in error testified that was the cause of the bad odor; but the plaintiff in error himself makes no such complaint; he puts the bad odors, and the consequent untenantability of his office, squarely upon the 'unoffending heads' of the rats. There is no contention that the rodents disturbed the office force by unseemly squeaking or squealing, or that they otherwise conducted themselves in any ungentlemanly or unladylike manner, or that they gnawed his furniture; or that they themselves had a bad odor; but the sole contention is that they brought in food, presumably from an adjoining restaurant (which was established about a year after the plaintiff in error leased his office), and that this food alone caused the offensive odors. The plaintiff in error, not being an object of charity but a man of considerable means, strongly objected to having food thus brought in to him from his neighbors, and especially the kind that was furnished, he not being especially fond of 'chicken bones,' 'fish heads, 'scraps of cheese,' 'tripe,' and such like delicacies. He testified that he disinfected the premises, but all in vain. He set traps, and every day caught scores of rats 'as big as squirrels,' but their numbers were no more diminished by his captures than were the ranks of the Allies or the Germans by the 'battles of the Aisne.' No traps, no disinfectants, 'no nothing' could stop the onslaught of these hungry and persistent vermin; they were imbued with the true 'Atlanta spirit,' and continued with undiminished ardor their kindly meant but misunderstood attentions. Finally, in despair, the plaintiff in error, having no 'Pied Piper' to entice them by the witchery of his music to their destruction in the 'rolling waters of the river Weser' (or the Chattahoochee), cut the 'Gordian knot' by breaking his lease and moving to another and distinct building. We do not think that, under the law and the evidence, the landlord can be held responsible for the action of the rats. . . . There is, however, another plea which the plaintiff in error might have set up by way of recoupment, which would have received our careful and sympathetic consideration. The fear of rats, and even of mice, entertained by the fair sex, is proverbial, and this court will take judicial cognizance of the fact that any real-estate office overrun by such vermin would lose all patronage of the ladies, and would be entirely deprived of the refining and elevating influence of their presence, to say nothing of the more substantial emoluments derived from business dealings with them. If the plaintiff in error had rested his case on this ground, at once solid and sentimental, this court (though all of its members are staid and settled married men, but, like all men of intelligence and discernment, fond of the beautiful) would have diligently sought to find a way to relieve him, if not by the harsh and inflexible rules of law, then by the softer and more pliant ones of equity. But the plaintiff in error (possibly through fear of his better half) not having made this plea, the only thing we can do, while affirming the judgment against him, is to render our congratulations upon the fact that at last he has escaped from his too attentive friends(?)—the rats."

# Correspondence

THE CONSTITUTION AS ENURING TO THE BENEFIT OF SPIES AND SYMPATHIZERS

*To the Editor of* LAW NOTES.

SIR: In an article signed by Henry A. Forster in your September issue it is stated:

"Any who assert that the Federal Constitution enures to the benefit of spies, secret agents of or sympathizers with the public enemy, must claim that the framers intended the Constitution to aid feudalism to conquer freedom."

Beyond any question, the Constitution *does not enure to the benefit of any criminal.* It does, however, enure to the benefit of every citizen of the United States, all of whom under the constitutional guaranties are legally deemed innocent of crime until convicted in a court after a properly conducted trial.

The Constitution does not enure to the benefit of a murderer as such. It does, however, enure to the benefit of every citizen charged with murder. In like manner it enures to the benefit of every citizen of the United States charged with treason or any other crime.

LEON F. MOSS.

Los Angeles, Cal.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

of LAW NOTES, published monthly at Northport, L. I., N. Y., for Nov. 1, 1917

State of New York } ss.
County of Suffolk }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared M. B. Wailes, who, having been duly sworn according to law, deposes and says that he is the Treasurer of the Edward Thompson Co., the publishers of LAW NOTES, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

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| Publisher, Edward Thompson Co. | Northport, L.I. |
| Editor, Wm. M. McKinney | " " |

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M. B. Wailes, Treas.

Sworn to and subscribed before me this 17th day of Oct., 1917. Geo. Babcock, Notary Public [SEAL]. (My commission expires March 30th, 1918.)

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WATSON E. COLEMAN,

PATENT LAWYER 624 F Street, N. W., Washington, D. C.

# Law Notes

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### The President and the Income Tax.

A QUESTION of some difficulty arises as to whether the salary of the President of the United States is subject to the income tax. The surcharge act while exempting congressional salaries makes no provision in favor of the President. It is, however, provided (Const. Art. II, § 1) that the salary of the President shall not be increased or diminished during his term. In *State* v. *Nygaard,* 159 Wis. 396, a similar provision was held not to exempt judicial salaries from a state income tax. The decision rests, however, principally on the effect of a constitutional requirement of uniformity of taxation which is not, so far as the income tax is concerned, found in the Federal Constitution. In the *Matter of Taxation of Salaries,* 131 N. C. 692, an income tax on judicial salaries was held to infringe a provision against the decrease of such salaries. The court said: "If the power to tax is conceded, the barriers erected by the constitutional limitation are swept away, and one branch of the state government is placed at the mercy of another. If the General Assembly has the power to impose a tax of one per cent on the official salary of a judicial officer, upon the same principle it could lay a duty which would cripple, if not completely paralyze, the whole system of the administration of justice in state tribunals." See to the same effect *Com.* v. *Mann,* 5 Watts & S. 403; *New Orleans* v. *Lea,* 14 La. Ann. 197. With respect to a war tax levied in 1863 on the salaries of all federal employees, Chief Justice Taney wrote to the Secretary of the Treasury: "The act in question, as you interpret it, diminishes the compensation of every judge three per cent; and if it can be diminished to that extent by the name of a tax, it may, in the same way, be reduced, from time to time, at the pleasure of the legislature." Meanwhile most members of the bar would be quite willing to accept the presidential salary and take their chances on the income tax.

### Conscription Law Again Sustained.

THE federal judiciary continues to disappoint those who expected its members to be impressed by the absurd pretenses put forward in opposition to the conscription law. In *U. S.* v. *Sugar,* 243 Fed. 423, an indictment for conspiracy to procure persons to violate the conscription act was sustained. Judge Tuttle in an able opinion disposed seriatim of the stock contentions that the act provides for "involuntary servitude," that it is class legislation, and that it confers undue power on the executive. Coming to "old doctor pacifist's favorite prescription," the claim that the militia may be called out only for local defense, the court said: "It is by no means clear that even if by this act Congress had provided for calling out the militia in pursuance of and to make effective its previous declaration of war, it would not have thereby provided for calling forth the militia 'to execute the laws of the nation,' and in so doing have been strictly within its constitutional powers. It is, however, in my opinion, unnecessary to determine or consider this question, for the reason that this act does not 'provide for calling forth the militia.' It will be noted that the act does not purport to provide for calling forth the militia. The portion of the act here involved merely authorizes the President 'to draft into the military service of the United States . . . any or all members of the National Guard,' etc. It is then provided that 'said members so drafted into the military service of the United States shall serve,' etc. The section of the National Defense Act referred to expressly provides that 'all persons so drafted shall, from the date of their draft, stand discharged from the militia.' It seems clear that Congress did not, by this language, intend to call out the militia, as such, but only to summon into the service of the United States those individuals who were, before being so summoned, 'members' of the National Guard. This, in my opinion, does not violate the constitutional provision so invoked. If the federal government has, as there can be no doubt that it has, the power to draft into the military service of the United States any of its citizens, surely it has power to draft such citizens notwithstanding the fact that they may previously have been members of the National Guard. Otherwise, it would be in the power of any state or of its citizens to easily evade or nullify any attempt of the federal government to exercise this power, and such power might be made wholly nugatory. The constitutional provision authorizing Congress to provide for calling out the militia does not, in my opinion, limit or in any manner affect the broad power expressly conferred upon Congress by the other constitutional provision already considered 'to raise' armies." So in *Ex parte Dostal,* 243 Fed. 664, Judge Westenhaver, after reviewing the authorities, said: "These cases fully sustain the views above expressed touching upon the force and effect of the National Defense Act and of the Selective Draft Law. They are authority for the proposition that a member of the National Guard becomes a part of the military force of the United States from the date of the draft order. They are also authority to sustain the power of Congress and the President thus to draft compulsorily into the service of the United States all officers and enlisted men of the National Guard. The

power to raise, organize, and equip armies, and to provide for the common defense, conferred by the Constitution (article 1, § 8, cls. 10, 11, 12, 13, 14, 15, and 17; section 10, cl. 3) is practically unlimited. Any contention that compulsory service is in violation of the Constitution is utterly frivolous." Is it possible that no one except Hannis Taylor really understands the Constitution?

**Declaration of Alienage.**

IN England, and perhaps to some extent in the United States, a resident minor of alien parentage may, on attaining his majority, elect between the citizenship of his domicile and that of his origin. In a few instances an effort has been made to evade military service by an election to be an alien, but so far the results have not been gratifying to the would-be slacker. In *Sawyer* v. *Kropp,* 115 L. T. N. S. (Eng.) 232, it appeared that a youth of German parentage was drafted into the British military service at the age of nineteen. Seeking to declare himself a citizen of Germany he was met by a holding that he had no right to make the declaration until he was twenty-one, and must in the meantime be regarded as a British subject liable to military duty. Just what welcome would await young Mr. Kropp when at the end of two years' service he wandered into the headquarters of Sir Douglas Haig and announced that he was henceforth a German the court does not assume to discuss. The legal sequel to the case is, however, to be found in *King* v. *Commanding Officer,* [1917] 2 K. B. 129. In that case it appeared that one Freyberger, arriving at his majority after being drafted, attempted to claim Austrian citizenship. The court said: "A British subject, although having a double nationality, cannot during a state of war divest himself of his allegiance to the British Crown in order to become solely the subject of an enemy state. On that ground alone I am of opinion that the appellant's case fails." In *Ex parte Dostal,* 243 Fed. 664, it appeared that an Austrian who had prior to the war enlisted in the militia sought to be discharged because of his alienage. The court said: "An alien who has not made a legal declaration of his intention to become a citizen is not obliged to enlist. He is not, under the provisions of Act May 18, 1917, subject to the selective draft. He cannot be compelled or coerced, in the present state of the law, to enlist or perform military service. He may, however, voluntarily offer himself for service as a soldier, and, if accepted, he thereby acquires the status of an enlisted man, subject to all its duties and obligations. The government may not accept him; but, if accepted, he cannot himself plead his want of qualification, nor escape service. . . . It is settled law that eligibility requirements are for the protection of the government, and not for the soldier. If the government waives an eligibility requirement, or if, after enlistment, it does not avail itself thereof to discharge the soldier, the latter cannot urge his want of qualification to obtain his discharge, or to escape punishment for an offense against military law."

**Disbarment for Sedition.**

THE press reports from time to time a disbarment on the ground of seditious and disloyal utterances, among the recent instances being a Socialist candidate for mayor in an Indiana city. Incidentally it may be noted that the defendant in *U. S.* v. *Sugar,* 243 Fed. 423, was apparently a lawyer. Of the power to disbar on that ground there can be no doubt. The power to disbar an attorney is inherent in the courts, and a statutory enumeration of grounds is not exclusive. (*State* v. *Mosher,* 5 Ann. Cas. 990; *In re Robinson,* 15 Ann. Cas. 415; and notes.) In *Ex parte Wall,* 107 U. S. 264, wherein an attorney was disbarred for participating in the lynching of a prisoner, the court said: "Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve. Whatever excuse may ever exist for the execution of lynch law in savage or sparsely settled districts, in order to oppose the ruffian elements which the ordinary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered." In the case of *In re Dormenon,* 1 Mart. (La.) 129, an attorney was disbarred for attempting to incite a servile insurrection in San Domingo. And it is by no means essential that the act of the attorney should constitute a crime to be a ground for disbarment. In the case of *In re Hilton,* 48 Utah 172, a disbarment for public abuse of the members of a court, the precise ground on which the lawyer who indulges in seditious speech forfeits his right to continue at the bar was set out, the court saying: "Where a statute makes good moral character, as does ours, a condition precedent to admission to the bar, it follows that when an attorney has forfeited his claim to such character by misconduct of such a nature as to render him unworthy and unfit to further be continued in office, the court may remove him." In *Jones' Case,* 12 Pa. Co. Ct. 229, a case which should be read attentively by those who persist in vociferating the invalidity of the conscription law, it was held that a wilfully false statement of law, made publicly by an attorney to bring about a riot, was ground for disbarment. Let the good work go on till no man whose loyalty to the government is qualified or partial remains to disgrace an honorable profession. It may be open to question whether the seditiously inclined should be permitted to enjoy life or property under the protection of the government which they contemn. There is no room for question that they should not be entrusted with the office of counselor in its courts.

**Residential Segregation of Races.**

THERE has been considerable recent agitation in a number of states in favor of the segregation of the white and colored races in separate residential districts, and ordinances to that effect have been passed in several Southern cities. As to the validity of this type of regulation the state decisions are in conflict. Segregation ordinances have been sustained in Maryland (*State* v. *Gurry,* Ann. Cas. 1915B 957), Kentucky (*Harris* v. *Louisville,* Ann. Cas. 1917B 149) and Virginia (*Hopkins* v. *Richmond,* 117 Va. 692). They have been held to be invalid in Georgia (*Carey* v. *Atlanta,* Ann. Cas. 1916E

1151) and North Carolina (*State* v. *Darnell,* 166 N. C. 300). The attitude of the courts which deem such an ordinance a proper exercise of the police power was well set forth in the Kentucky case as follows: "It needs no extended argument at this time to demonstrate that this state is fully committed to the principle of the separation of the races whenever and wherever practicable and expedient for the public welfare; not to segregation as a measure imposing stigma, for none is thereby imposed, but in order to prevent such conflicts as are shown by this record to have resulted in Louisville from the racial discord consequent upon the close association of the races; and in order that the solidarity of the races may be preserved; and, finally, that in a spirit of mutual helpfulness and racial friendship, each race may attain those heights of human development which are its to be won, and may aid in bringing to this state and nation of ours all that the undreamed future has in store for us. Much has been done in the years gone by, much is being done to-day by the white people of the nation for the uplift of the colored race. But those who have studied the future of the race (and, in fact, its leading member in the country to-day), declare that he must ultimately rise largely through the co-operation, the earnest efforts and the loyal service of his own more fortunate and more enlightened brothers." So in the Virginia case it was said, quoting with approval from a well-known law writer (1 Va. Law Reg. N. S. 330): "The bona fides of these ordinances cannot be made a serious question in law or economy. The different cities have striven to do a public good, and have not been actuated merely by race prejudice. The truth is these ordinances are a natural outgrowth of existing conditions and are in the most instances intended to preserve such conditions by preserving present separate residences and preventing one race from encroaching upon the other. The ordinances are intended to protect each race from harm from the other." The cases taking the contrary view avoid a discussion of the policy of the regulation, deeming it to be an unwarranted invasion of the rights of property owners. As was said in the Georgia case: "The right of the owner of property to reside on it is inherent, and permanent deprivation of that right is in substance a taking of the property itself. Deprivation thereof in the manner above indicated, without any symbol of legal procedure, is opposed to the guaranty as embodied in the due process clauses of the state and federal constitutions."

#### The Supreme Court Decision.

IT was generally believed by the profession that the federal Supreme Court would consider the matter of residential segregation to be wholly a question of state polity. That court sustained the "Jim Crow car" acts (*Louisville, etc., R. Co.* v. *Mississippi,* 133 U. S. 151; *Chesapeake, etc., R. Co.* v. *Kentucky,* 179 U. S. 388; *McCabe* v. *Atchison, etc., R. Co.,* 235 U. S. 151). In the *Berea College Case* (211 U. S. 45) it sustained a separate school statute of Kentucky against the spirited dissent of Mr. Justice Harlan who said that the decision made it possible for a state to "make it a crime for white and colored persons to frequent the same market places at the same time." But in a case just decided (*Buchanan* v. *Warley*) the segregation ordinance of Louisville was held to be void, on grounds broad enough, apparently, to invalidate all regulations of that kind. The court admitted the existence of a "serious and difficult problem arising from a feeling of race hostility," but said: "Its solution cannot be promoted by depriving citizens of their constitutional rights and privileges. The right which the ordinance annulled was the civil right of a white man to dispose of his property, if he saw fit to do so, to a person of color, and of a colored person to make such disposition to a white person." The contention that the police power warrants such a provision is wholly denied by the court. From one point of view the decision is to be regretted. It is ordinarily better that problems peculiar to a section of the country should be worked out by the persons most affected, unhampered by rulings imposed on them by extraneous authority. Some measure of sectional bitterness is often provoked by the feeling that the general government has imposed its will on a locality without a full understanding of local conditions. From another angle, the decision enforces a salutary lesson—that no community can solve the problem presented by its submerged classes by shoving them into a corner out of sight. If the prosperous and cultured cannot rid themselves of the proximity of ignorance and poverty, it may well hasten the day when ignorance and poverty will disappear.

#### Up to Date Judges.

IT is often said that the bench is ultra conservative, that the judges live in the musty past, seeking to solve the problems of the twentieth century in the language of Bracton and the Year Books. But a brief survey of the reports will show how closely our jurists keep in touch with the ever-shifting vernacular of the press. In *Lever* v. *Lever,* 85 N. J. Eq. 345, decided in April 1915, when the armies were just beginning to dig in along the Aisne, Vice Chancellor Leaming said: "A husband is necessarily slow to reach a conviction of infidelity on the part of his wife; he should and does fight that conviction to the last trench." In the same volume (*Frost* v. *Frost,* p. 571) Judge Terhune, referring to the activities of a detective employed by a jealous husband, said: "Having telephoned, he again took up a position of watchful waiting in the front of the restaurant." In *Irving* v. *Wagner,* 175 Iowa 198, Chief Justice Evans in commenting on a trial amendment said: "It is possible that, as a military manœuvre, this line of action could be justified as a 'curtain of fire' to prevent the plaintiff from bringing forward his supporting testimony." It must be confessed, however, that almost in the next sentence the chief justice relapsed into the archaic, saying: "Even the code duello does not permit the shooting of an adversary after he has fallen. The amended record by appellee has served no other purpose here than as a quasi mutilation of a dead body." A little more familiarity at this point with sundry well-authenticated exploits of the Hun might have led to a different result.

#### Lawyers as Leaders.

THE laity indulges from time to time in criticisms of the legal profession in public life to which the press delights in giving currency. Thus a delegate to the Massachusetts constitutional convention has been widely quoted as saying: "One of the greatest handicaps to our progress is the fact that there are so many lawyers in the

body. They persist in raising technicalities and debating them to the limit. Some of them are politicians and are probably talking for effect at home. This crowd is very much disappointed over the slight attention that is being paid to the convention by the newspapers; it doesn't satisfy the fellows who are eager to be in the limelight. There are over 100 lawyers in the body and nearly all of them like to talk and argue. That is what is delaying us." But it is to be noticed that in Europe where the acid test of war has thrown into the discard all but the most efficient leaders, it is the lawyers who stand in the positions of prominence. In France, M. Viviani, who was prime minister when the war began and who headed the war embassy to the United States, and two of his successors, were lawyers. In England it was a lawyer premier, Mr. Asquith, who made the brave decision to stand by the pledged faith of the Empire, and another lawyer, Lloyd George, who is the most commanding figure in Britain to-day. Kerensky the lawyer is apparently the sole hope of revolution-torn Russia. In Italy, Sonnino the lawyer is a more potent force than the monarch himself. The legal education of our own war President has doubtless been of no small assistance to him in the trying situations through which he has passed. If it lies in the cup of destiny that our own land shall be driven to exert the full extremity of its strength, the experience of Europe and America alike gives warrant for the prediction that not from press or pulpit or military camp but from the profession of Jefferson and Lincoln the adequate men to guide our nation will come forth.

#### On the Trail of the Shyster.

A COMMITTEE of the Baltimore Bar Association has recommended legislation in aid of the code of ethics which if adopted will, in the language of the committee, "put teeth into the rules." The proposed act is as follows: "The Court of Appeals shall adopt such rules and regulations governing attorneys-at-law in their professional conduct as the Court of Appeals may, in their discretion, consider advisable, and it shall be the duty of the judges of the courts of the several counties of the state and of Baltimore city, including the judges of the Orphans' Court of the several counties of the state, and the judges of the Orphans' Court of Baltimore city, to enforce such rules and regulations." While the formulation of a code of ethics by the American Bar Association was a step in the right direction, it was of course but a preliminary or educational step. A code wholly without legal sanction is observed by the majority for whom no code is needed and disregarded by the unethical minority. The educational work of the Bar Association would seem to have progressed to the point where it is feasible to put the code of ethics into such form that it will reach those who do not care whether their conduct is ethical or not so long as they keep out of jail. The legal profession is to-day the only one which maintains a strict discipline over its members in respect to their conduct toward those who employ them. But there are many matters short of sheer dishonesty in which a small number of practitioners continue to bring the profession into disrepute, and such a measure as is proposed by the Baltimore Association would seem to be the most direct and certain method of putting a curb on the unethical few whose activities the public is too prone to regard as characteristic rather than exceptional. Just how the plan of putting the disciplinary power in the hands of the judges will work remains to be seen. The semi-paternal relation of the bench to the bar seems to produce excellent results in England. But whether in a country where the bench is chiefly elective and transition from bar to bench and back again is frequent, the judges will assume or the bar readily submit to a power of ethical supervision presents some question. It is however probable that the actual practice under the Baltimore proposition will not vary greatly from that in New York where the initiative with respect to an extensive disciplinary power (see Judiciary Law § 88, McKinney's Consol. Laws, book 29, p. 72) is left largely to the committees of the bar.

#### Construction of Uniform Legislation.

WE have commented more than once on the manner in which the purpose of uniform state laws is set at naught by diverse judicial interpretation of their terms. In *Commercial Nat. Bank* v. *Canal-Louisiana Bank,* 239 U. S. 520, Mr. Justice Hughes, speaking for the court, approached the construction of the Uniform Warehouse Receipts Act in a manner worthy of general imitation. Referring to several cases decided prior to the statute in question he said: "We do not find it necessary to review these decisions. It is apparent that if these Uniform Acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the Uniform Warehouse Receipts Act expressly provides (§ 57): 'This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.' This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the Uniform Act and that it should not be regarded merely as an offshoot of local law. The cardinal principle of the Act—which has been adopted in many states—is to give effect, within the limits stated, to the mercantile view of documents of title. There had been statutes in some of the states dealing with such documents, but there still remained diversity of legal rights under similar commercial transactions. We think that the principle of the Uniform Act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it."

#### Brutality to Convicts.

A RECENT case brings sharply to view the fact that in some parts of our country the inhuman treatment of convicts which characterized past ages still survives. In *State* v. *Mincher,* 172 N. C. 895, a witness from a convict camp testified: "July 20 I saw 26 whipped and one died that night; Tuesday the 27th I saw 7 whipped," and so on for nearly a page. At one place in the narrative there are asterisks, which the court explains as follows: "There has been omitted above in the place

marked by points unprintable evidence of brutality almost beyond conception. But it is on the record of this court for all time without any contradiction from the defendant." It is a relief to turn from the statement of facts, with its pages of sickening narration of cruelty, to the opinion of the court which reflects the highest and most enlightened humanity. Chief Justice Clark said: "Nothing is more fatal to discipline in prisons than the infliction of punishment which deprives the convict of self-respect and makes him an outlaw in spirit by its injustice and brutality. Corporal punishment has not only been found unnecessary elsewhere and is strictly forbidden, but kindly treatment with reasonable and just punishment proportioned to the offense, and not inflicted at the arbitrary will of a subordinate, sometimes moved by passion, has been found more successful. In this state last Christmas the Governor gave a furlough, as a reward for good conduct, to a large number of inmates of the penitentiary, and in not a single instance was his confidence abused. Convicts are men and are more moved by appeals to their better natures, and by the hope of reward for good conduct, with moderate and just punishments only when found necessary, than by such brutalities as appear in this record. . . . When some forty years ago in *S.* v. *Oliver,* 70 N. C. 60, this court abolished the barbarous doctrine of the common law that a husband had the 'right to whip his wife with a whip no larger than his thumb,' which the court had then reaffirmed as recently as *S.* v. *Rhodes,* 61 N. C. 453, the court needed no other authority than to say with simplicity and directness: 'The courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances.' Even if the common law had ever recognized the right of an official in charge of prisoners to whip them at his own pleasure and to any extent he wishes (which it never did), and if, further, the constitution had not forbidden the infliction of such punishment even under authority of a verdict by a jury and sentence by a judge, still the court, in response to the sentiment of a more enlightened and juster age, would need no authority further than to say, 'We have advanced from that barbarism.'" It is also gratifying to observe the following footnote appended to the opinion: "Laws 1917, ch. 286, § 7, now forbids any prisoner to be flogged unless of the 'incorrigible class' at the state prison and then only in the presence of the state physician or chaplain."

#### Civil and Ecclesiastical Law.

THOUGH the ecclesiastical law as a factor in the civil life of Anglo-Saxon communities has long been a thing of the past, a contention based on ecclesiastical tenets occasionally appears in the recent cases. In *Feehley* v. *Feehley,* 129 Md. 565 (1916), it appeared that the parties had been divorced. Each had remarried and been again divorced, and, apparently preferring the familiar ills to those they knew not of, they became reunited, and a ceremony giving religious sanction to their renewed cohabitation was performed. It was clearly shown that the officiant did not regard the ceremony as a marriage and did not intend to perform a marriage ceremony for the reason that his church did not recognize divorce and regarded the parties as already husband and wife. Under a statute by which "some religious ceremony" is essential to a valid marriage, it was held that the ceremony was in legal effect the celebration of a marriage. Another attempt to assert an ecclesiastical limitation on the validity of a marriage recognized by the civil law was passed on in *Chinquy* v. *Begin,* 42 Quebec Super. Ct. 261. The action was for libel in asserting that a child was illegitimate. A portion of the answer was summarized by the court as follows: "He adds, that Charles Chiniquy [the father] as a priest of the Church of Rome, was incapable of contracting a valid marriage, particularly owing to his solemn vows of perpetual chastity, made to his God and his Creator. The quality of priest, says he,—which never could be abandoned—is an absolute impediment to marriage, according to the law which has always prevailed and still governs this country, according to which a marriage has always been, and still is a religious act." The court said: "Whether the defendant has made a correct statement of the doctrines of his Church, I am on this point not in a position to say; all I can say is, that I find no sanction for it in the law of our land. As a marriage has always been and still is a religious act." for that purpose it may be useful. Further than that, it does not and cannot go. If union with the Church of Rome creates a contractual relationship in law, that relation may be subject to all the penalties of a broken contract. Excommunication, with all its present and future consequences, would probably be the penalty. . . . I dismiss the defendant's plea as absolutely unfounded in law and in fact. I maintain the prayer of the plaintiff. I condemn the defendant to pay to the plaintiff the sum of three thousand dollars, with legal interest from this day." It is of course always unfortunate when religious convictions sincerely held bring their possessor into collision with the law. But if the law were entirely squared with one set of ecclesiastical opinions the devotees of every other belief would be in even more evil case.

### THE LIMITATIONS OF CIVIL AND POLITICAL RIGHTS

MATTHEW ARNOLD once suggested that in the interests of clear and honest thinking we should cease to employ all terms which have been spoiled by long continued misconception and misuse. Among such spoiled and battered terms is the word "liberty." The prevailing idea of what it stands for in a political society is so sadly confused that one is tempted to expunge it from the vocabularies, and in considering and defining the rights of a free people, to employ some term less susceptible to popular abuse. But the word is so noble and majestic, so intertwined with the thoughts, the hopes, the aspirations, the struggles and the achievements of a free civilization—indeed its very life blood—that it would seem worth while to redeem it, to restore it to its rightful place, and to vindicate its employment in the service of a rational interpretation of civil and political rights.

This misconception of liberty and the consequent bewilderment of the unthinking, are due to a mental image, to the apprehension of liberty as an abstract quality, to the idea immortalized in marble and bronze, the elegiac inspiration of the poet, the panegyric of the orator, the oriflamme of the patriot, the cynosure of the oppressed. But that is not liberty; rather it is its absolute quality which we may not know and enjoy, for nowhere in nature

from suns to man or from man to animalculum has it ever existed. It is the ideal of liberty, perchance its very spirit, keeping us all in the great current of revelation issuing from Time and shedding its light on the ultimate destiny of man. The history of humanity is a serial, we cannot forecast the end, neither can we anticipate it or translate it into the earlier chapters or present issues. We live in a universe governed by law, among men subordinated to law, in a society restricted by law, and it is only in the terms of law that we can know liberty if we would possess and preserve it. A man on an uninhabited island enjoys a civil and political liberty that is absolute, but the instant a second man of equal power, with different ideas appears on the scene, compromise and restriction are inevitable. None of us liveth unto himself.

Guizot, in his History of Civilization, observed of the human mind that it "continually oscillates between an inclination to complain without sufficient cause and to be too easily satisfied." Whatever truth there may be in the second term of this affirmation we do know that social and mental unrest, like the poor, is always with us, manifesting itself in manifold ways. Among the proletariat, so called, we have strikes and new schemes for the social order, and in varying circles of society we have Feminism, New Thought, Futurism, post-Post Impressionism, Cubism, dietetical fads, a multitude of phenomena indicating the avidity of human nature for novelty and change. Always we have had with us the iconoclast, frequently the destructionist and occasionally the sincere and upright patriot declaring and bewailing the downfall of our personal liberties. That little cloud has hung upon the horizon of every nation. It was descried upon our own horizon in our first days. Suddenly it has gathered unto itself the scudding flecks of discontent and now darkens toward the zenith. In these tumultuous days when ploughshares are beaten into swords and pruning-hooks into spears, and the prophetic Joels remind us that the triumph of a principle is more than the gathering of a harvest, we are told that the very principle we are fighting for lies bleeding and prostrate within the walls of our crumbling institutions. Is this true? Shall Liberty prepare its shroud while Despotism stalks forth in garments new?

The present controversy rages about the Bill of Rights, particularly, the first amendment to the United States Constitution. But before endeavoring to interpret and apply its provisions, and in order to clarify the issue, there are two fundamental propositions necessary to be kept in mind. These are the distinctions between private and public liberty; between political and individual liberty.

Private liberty is the legal and moral right every member of society has to think, speak and act with proper regard to the individual rights of others. Public liberty, on the other hand, is the right which the State (which is merely another name for all of us) as a body politic has to control the actions of individuals. Again, individual liberty is the liberty of the man, and political liberty is the liberty of the citizen. It is associated freedom. As a citizen, the individual must consider not himself alone but the entire body politic of which he is but one. He must submit to such restraints as the sovereign, of which he is a part, imposes. Such restraints are in no way incompatible with civil liberty, indeed all civilization proves that they are the very breath of its life. In the last analysis civil liberty is this restraint imposed by the laws of a sovereign people on the more powerful classes of a community preventing the abuse of that power to the danger of weaker classes. And we must not fall into the confusion of regarding the term "classes" as representing distinct groups. Such a distinction is a falsity and a fallacy. Every individual is a member not of one but of several classes. In one he may be subject to oppression, but in some others he may possess the power of oppression. The restraint of law is the universal saving grace. And in a government like ours this is the very essence of democracy, for while in a despotism the law descends from the sovereign and is *imposed* on the people, in a democracy the law, to which we are subject, ascends *from* the people and is the product of its impulses, its conscience and its traditions.

This is the very genius of the American Republic. It was founded upon the proposition of civil and political liberty, not of the individual as such but of *all* its citizens whose will collectively, expressed by majorities, is the source of all authority. The primary relation of all is that of citizens, and while we may consider our rights as individuals we must no less consider our duty as citizens to the government, which, representing the consent and interest of all, is the only supreme majesty.

The first amendment of the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press, or the right of the people peaceably to assemble." The privileges, whether we regard them as rights or more properly as immunities, guaranteed by these provisions, belong only to persons who are citizens of the United States. *U. S.* v. *Williams,* 194 U. S. 292.

It is settled that this amendment is not a limitation on the powers of the states. It is also settled that this amendment together with the succeeding nine amendments, known as the Bill of Rights, was not intended to establish any novel principles of government. The Bill of Rights simply embodied certain inherited guaranties and immunities which immemorially had been subject to well-recognized exceptions. In incorporating these principles into the Constitution there was no intention of disregarding the exceptions which continued to be recognized as fully as if they had been expressed. *Robertson* v. *Baldwin,* 165 U. S. 275, and Cooley, Const. Lim.

While the provision has all the force of a prohibition directed to the courts and to the lawmakers, it is a grotesque misconception to assume that it confers the right upon a citizen to speak and to publish according to his personal volition whatever he may choose. The privilege of free speech and a free press has its limitations. In other words the right is not absolute. The copyright laws of the United States, for instance, are not within the prohibition of the Constitution, and the press is not free to publish matter protected by them. Liberty of circulating printed matter through the mails is as essential as the liberty of publishing; nevertheless Congress by various enactments has inhibited the transportation of papers, books and pamphlets having or tending to have a corrupting or demoralizing influence upon the people. Suits for libel and slander are not precluded. The continuance of a boycott may be enjoined, though speech, spoken words, are used as the instrumentalities by which it is to be made effective. *Gompers* v. *Stove & Range Co.* 221 U. S. 418.

Illustrations might be extended indefinitely of the doctrine, sustained by the weight of authority in England and in the United States, that the privilege of publication, whether by speech or by press, is not an absolute right but is and always has been subject to limitations. In other words, principles and rights are subservient to the welfare of society.

Hitherto this principle has never been seriously questioned. To-day it is not only questioned but it is asserted that even the limitations have been swept aside, that the constitutional right of assembly has been nullified, that the press is prostrate and the gag of tyranny is in the mouth of free speech. How can we account for this phenomenon? Undoubtedly in the psychology of war. In the piping times of peace, when even the grasshopper is a burden, and the universal air is vibrant with the strident and raucous voice of free speech talking wisdom like a god or nonsense like an idiot, we are prone to regard it all with amiable complacency, even benevolence. But in a surging time of war, when patriotism is no longer merely a sentiment but a principle aflame and an enthusiasm on fire, language which hitherto expressed to our ears mere dreams of folly takes on a new color, perhaps of lawlessness, disloyalty and sedition. The Three Tailors of Tooley Street are suddenly transformed from harmless petitioners to the most formidable traitors that ever menaced the safety of a free people.

When a nation is fronted with a situation such as this there is presented to it the ultimate test of its genius for self-government.

Is it possible to draw a line, distinctly and exactly defining the proper limitation of these civil and political rights?—between the invasion of right on the one hand and the sanctioning of license on the other? The President of the nation has declared that it is difficult to know just where to draw the line.

It is a question of the higher expediency. Between the language of discussion and language inciting to lawlessness there is a wide distinction and it is this distinction which marks the difference between a despotism and a democracy, for in the former there must be obedience to arbitrarily imposed edict, in the latter there is obedience to self-imposed law after free and open discussion.

A rule as to the limits of free speech, which seems to evince the cold neutrality of the impartial judge, was recently (July, 1917) laid down by Federal Judge Rose in the United States District Court for the District of Maryland in the case of *U. S.* v. *Romanus E. Baker and Jacob M. Wilhide.* The defendants were on trial on the charge of conspiring to cause young men to evade or violate the conscription law. At the conclusion of the Government's case the court directed the jury to return a verdict of not guilty. The case (as is the custom with charges to juries) is not reported, but the following extract from the remarks of the court is taken from the official records:

*"The Court:* I might as well make perfectly clear what I understand to be the issue in the case. Every man has a right to any opinion he may see fit to form about any proposed law or about any law that is on the statute books. Any man may do anything in itself legal to secure the repeal of any law in force. To that end he may make any argument that commends itself to his reason and judgment against the policy of any particular law, whether it be the law for a selective draft or any other. And he is not answerable for the wisdom of his arguments. He could not very well be put on trial even for the good faith of some of them. I am afraid if he could be, most of the political orators in every campaign would be liable for much they say about the other party. We all of us say more against our political opponents than we really believe. But there is one limit. As long as the law is the law, it is the duty of every man to obey it, and he may not, under color or pretense of arguing against the wisdom of the law, or of advocating its repeal, do anything with intent to procure its violation."

Here is a rule, applicable alike to speech and publication (the case involved the distribution of circulars) marking out a definite thoroughfare which all loyal citizens can follow, and if disloyal unfortunately there should be, in considering it they may well exclaim with the melancholy Dane, "We must speak by the card, or, by'r Lady, equivocation will undo us!"

With the regulated right of the freedom of speech goes the co-ordinate right of assembly. We have seen public assemblages in the highways and parks dispersed and orators ejected from their improvised rostrums emitting the while threnodic lamentations over the invasion of a sacred constitutional right.

The soapboxer—a term of euphemism and not of derision—descends from the antique world. He was old when the curtain rose at the dawn of civilization and he will be young when it is rung down at the end. He has been the bright morning star of reformations. He has laid the eggs great reformers have hatched. He is an institution. We would not abolish him if we could. But on this issue, so far as his *right* is concerned the beam is rather in his own eye than in the eye of the authorities.

The first amendment did not create the right to assemble peacefully nor did it guarantee its continuance. It assumed the right to assemble and protects that right against congressional encroachment. Therefore the people must look to the states for their protection in this right. Originally that power was placed in the states and it never was surrendered to the United States. *U. S.* v. *Cruikshank,* 92 U. S. 542. The constitutionality of ordinances prohibiting public speaking in streets and highways without permits has been upheld again and again, and state statutes authorizing boards of park commissioners to make rules for the regulation of public speaking in parks have been declared valid. This proposition is too familiar to require iterated citation. *Fitts* v. *Atlanta,* 121 Ga. 567; *Com.* v. *Abrahams,* 156 Mass. 57; *Davis* v. *Massachusetts,* 167 U. S. 43. Public highways are intended for pedestrian and vehicular traffic, and public parks for recreation and amusement. Any other use of them is not a *right* but a *concession,* interfering with their primary purpose and use.

There remains yet another view. The provision of the amendment is ". . . . peacefully to assemble and to petition the government for a redress of grievances." In the New York state constitution the provision runs, art. 1, sec. 9, ". . . . peacefully to assemble and to petition the government or any department thereof." Is it not the right of petition that is protected rather than the right of assembly? Apparently this was the view of Cooley expressed in his Constitutional Limitations and of Story in his work on the Constitution, and it is maintained by

implication at least in *U. S.* v. *Cruikshank,* 92 U. S. 542, wherein it was held that an indictment brought under section 6 of the Enforcement Act of 1870, 16 Stat. L. 141 (incorporated in R. S. sec. 5508, embraced in Penal Laws sec. 19 and repealed by sec. 341 thereof) charged no crime because it was not alleged that the assembly was for the purpose of petitioning the government with respect to a government matter.

It may be confessed that, while the authority to disperse assemblages in public streets is unquestionably in the police power and rightfully exercised, the *manner* of its exercise may not have been always tactful or judicious. Would it not be wise to lodge the exercise of this power in the administrative department of the government, especially in these trying times when the question whether there has been a transgression of proper limitations is so frequently involved? While the rigor of the law must in all cases of clear necessity be invoked, the rule of reason should always be applied that there may be a true enforcement of the spirit of the law. Cicero pleading against a too injudiciously rigid application of the Roman Law said, *Summum jus summa injuria* (extreme law is extreme injustice).

The conclusion of the matter is that constitutional rights so limit one another that obedience to limitation by law is absolutely necessary to equal protection by law. Civil and political rights have never perished in a liberal commonwealth where this balance has been maintained. Obedience from the citizen, full protection from the government. And these mutual obligations are absolute, they can neither be divested by the one nor delegated by the other. The instrument of our liberties is the Constitution, with the power of its final interpretation in the court and the force of its execution in the executive, and these functions must be administered exclusively by the Government in times of war as well as in times of peace. It is pertinent to recall the decision in *Ex parte Milligan,* 4 Wall. 2, wherein the Supreme Court declared that the Constitution was a charter for the government of the country in times of war as well as in peace and that except where actual clash took place or the civil courts were closed the constitutional safeguards always protected the citizen from loss of life or liberty except by verdict of a jury. To the plea of necessity (trial and conviction by military tribunal) the court said: "If this were true it could be well said that a country preserved with the sacrifice of the cardinal principles of liberty is not worth the cost of preserving." The Secretary of War, speaking, it is believed, for the Government, has declared that it will not tolerate the effort of lawless groups to administer government functions, that outside interference will not be sanctioned. The constituted authority must not only hold the scales of justice in equipoise but must carry its flaming sword to strike down all attempted usurpation, under whatever name or behind whatever mask, of its powers. In a government where liberty is regulated by law, there must be on the one side an implicit and instinctive obedience to the law, on the other side a full protection with absolute impartiality of every right recognized by law. The one is complementary to the other. And when either or both fail, we know, if we have read the lesson of history aright, that freedom dies, patriotism expires, national spirit decays and liberty withers in the blast of its impending doom. OTTO ERICKSON.

## A DECADE OF DEFENSE.

IN 1906 Congress launched a new offensive against the railroads in the passage of the first Employers' Liability Act. The Supreme Court describes the federal act as a statute "that takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action. . . . It is a statute which permits recovery in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred. . . . It introduced a new policy and quite radically changed the existing law." *Winifree* v. *Northern Pacific Ry. Co.,* 227 U. S. 296-302.

The "new policy" was the determination of the government to regulate by federal law the liability of carriers to their employees. The "change in existing law" was expressed in an enlargement of the carrier's liability as it existed at common law and under state statutes, and the impairment and destruction of defenses existent when the contract of employment was made and when the employee was injured. The "new policy" where applicable operated regardless of the common law or the statute law of the State. Liability non-existent at the common law sprang into existence. Defenses complete at common law and established under state statutes were either abrogated or weakened to the point of impotency. Questions of liability dependent upon the common law in force in the several states or upon the statute law of the respective states had been practically thrashed out, and right and liabilities in the several states had been determined by the courts of those states, and were well understood by the carriers and employees in the states. The state decisions on the questions arising under state law are now of value only as construing those legal principles involved in the federal law.

Federal decisions must govern the federal law, and the federal decisions prior to this federal act had been restricted to a construction of statutes and common law in force in the different jurisdictions. The "new policy" made necessary the judicial determination of the extent of the new liability created and the effect upon the defenses of the carrier as existent under the common law and state statutes.

A decade has passed since this "new policy" was launched. The efforts of the defense during this decade to have its liability legally determined and its legal rights fixed, and the results of those efforts, are interesting as being illustrative of the desire of the carrier to know its legal fate under this "new policy," and the fate decreed it.

The first defense of the carrier was that defense which would have been employed under similar circumstances by any man or any other industry. The constitutionality of the "new policy" was attacked. The legal fraternity at that time was not prepared to believe that Congress had constitutional authority to regulate the liability between master and servant. Lawyers could not realize that clauses of the Constitution written before there was a railroad could be so construed and made applicable. This defense resulted in the Supreme Court decision in the first Employers' Liability Cases, 207 U. S. 463. This decision was a technical victory for the defense in that

the Act was declared unconstitutional, but in reality was a defeat for the carrier in that the law's unconstitutionality was declared only because it sought to regulate liability to intrastate as well as interstate employees. That it was a real defeat at that time is illustrated by the fact that this Act of 1906 was not declared unconstitutional as to the District of Columbia and the territories, and was later in the case of *El Paso & N. E. Ry. Co.* v. *Guitterez, Admr.,* 215 U. S. 87, held constitutional as to the territories as being an act passed under the plenary power of Congress over the territories. This exception illustrated the power of Congress to regulate the relations of master and servant within its constitutional province.

The ground of the Act's unconstitutionality was easy of remedy and the second Liability Act of 1908 limited as to interstate employers was the real result of the first defense of the carriers to this "new policy." This initial defense based on the unconstitutionality of the Act was renewed as to the second Act, was unsuccessful, and the "new policy" was established as the law of the land. Second Employers' Liability Cases, 223 U. S. 1.

This "new policy" where applicable was early declared exclusive of the rights of employees and the liability of carriers. In Second Employers' Liability Cases, 223 U. S. 1, it was declared:

"Congress has not exceeded its power in that regard by prescribing the regulations embodied in the Employers' Liability Act. Those regulations have superseded the laws of the several states in so far as the latter cover the same field." And—

"State legislation, even if in pursuance of a reserved power, must give way to an Act of Congress over a subject within the exclusive control of Congress. Until Congress acted on the subject, the laws of the several states determined the liability of interstate carriers for injuries to their employees while engaged in such commerce, but Congress having acted, its action supersedes that of the states, so far as it covers the same subject. That which is not supreme must yield to that which is."

The exclusiveness of this supreme law has been repeatedly announced by the Supreme Court. The carriers have repeatedly invoked this rule in their defense. It is interesting to note that this defense based on the supreme law has not always been availing. The supreme law itself has yielded where it was claimed the defense could show no injury in the application of a state statute, and causes have been tried under the state law, and verdicts upheld where the federal law was applicable and theoretically supreme, the Supreme Court holding that in such case the federal law was supreme and applicable and it was error to apply the state law, but such error was not prejudicial. *Chicago, Rock Island & Pacific Ry.* v. *Wright,* 239 U. S. 548.

It would seem to follow that the defense of the exclusiveness of the Act is good with slight variations against the carrier.

The defense resting upon the engagement of the carrier and the employment of the servant in interstate commerce under the facts involved has been repeatedly urged. The scope of the decision of the Supreme Court in the Pederson case, 229 U. S. 146, to the effect that "one carrying materials to be used in repairing an instrumentality of interstate commerce is engaged in such commerce, and so held that a railroad employee carrying bolts to be used in repairing an interstate railroad and who was injured by an interstate train is entitled to sue under the Federal Employers' Liability Act of 1908," practically put every employee, except those purely locally employed, under the Act.

And the decisions relative to persons and commodities transported and engagements in commerce culminating in the decision to the effect that an engine going from one state to another for repairs only was engaged in interstate commerce, have practically embraced the operations of railroad activities. This defense has practically been concluded. This is especially true in view of the decisions which allow by amendment a conversion from a state to the federal cause of action, and a substitution of the necessary parties in such transition. *Missouri, Kansas & Texas Ry. Co.* v. *Wolf,* 226 U. S. 570; *Seaboard Air Line* v. *Renn,* 241 U. S. 290.

This defense was further weakened by the decision which allowed the jury to determine the character of commerce engaged in. *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248; *Pennsylvania Co.* v. *Donat,* 239 U. S. 50.

The defense as to proper party plaintiff was available at first, in suits for homicide. Under many state statutes suit was by the next of kin or heirs. Such a suit was held not maintainable under the Act. The right vested in the administrator. *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale,* 229 U. S. 156; *American Railroad of Porto Rico* v. *Birch,* 224 U. S. 547. This defense, however, has been destroyed by the liberality of the decisions permitting substitution of the administrator as a party plaintiff in place of the heir, and incidentally preventing the running of the limitation statute, the amendment relating back to the commencement of the action by the wrong party plaintiff, the heir. *Missouri, Kansas & Texas Ry.* v. *Wolf,* 226 U. S. 570; *Seaboard Air Line R. R.* v. *Renn,* 241 U. S. 290.

The defense of contributory negligence is always urged. It was never a complete defense under the statute. *Seaboard Air Line Ry.* v. *Tilghman,* 237 U. S. 499; *Great Northern Ry. Co.* v. *Wiles, Admr.,* 240 U. S. 444; *Illinois Central R. R.* v. *Skaggs,* 240 U. S. 66.

The purpose of the contributory negligence clause was to abrogate the common law rule of complete exoneration in case of contributory negligence of the employee. *Norfolk & Western R. R.* v. *Earnest,* 229 U. S., 114.

Contributory negligence was in effect changed to comparative negligence, and the practical result has been largely to eliminate this defense of the carrier. The Act of 1908 went the Act of 1906 one step better in that it completely eliminated this defense when there was a violation of a safety appliance law. *Grand Trunk Ry. Co.* v. *Lindsey,* 233 U. S. 42.

The defense of assumed risk was preserved except when the safety appliance law was violated. *Seaboard Air Line Ry.* v. *Horton,* 233 U. S., 492, 239 U. S. 595; *Jacobs* v. *Southern Ry. Co.,* 241 U. S. 229.

The defense based on the character of damages recoverable had a stormy time. It was determined that damages were compensatory only, and that pecuniary losses only were recoverable. *Michigan Central R. R.* v. *Vreeland,* 227 U. S. 59; *American R. R. Co. of Porto Rico* v. *Didrickson,* 227 U. S. 145; *Gulf, Colorado & Santa Fe Ry.* v. *McGinnis,* 228 U. S. 173; *Garret, Admr.* v. *L. & N. R. R.,* 235 U. S. 308.

No damages were recoverable for pain before death. *St. Louis, I. M. & S. Ry.* v. *Hesterly,* 228 U. S. 702.

As the Act did not provide for survival of the right of action of the injured employee, his right was extinguished by death. *Michigan Central R. R.* v. *Vreeland,* 227 U. S. 59.

It became clear that damages covered the pecuniary loss only. As soon as this became clear, confusion as to damages was initiated with the amendment of 1910. This amendment preserved the right of the injured employees. *St. Louis, I. M. & S. Ry. Co.* v. *Hesterly, Admr.,* 228 U. S. 702.

Damages were then allowable for pain and suffering prior to death. Damages were not allowed for loss of companionship of a husband, but were allowable as compensation for the loss of the guidance and care of a father. *Norfolk & Western Ry. Co.* v. *Holbrook,* 235 U. S. 625.

The jury should apportion the damages among the beneficiaries. *Gulf, Colorado & Santa Fe Ry.* v. *McGinnis,* 228 U. S. 173. But the jury need not do this.

In this clear state of confusion the question of damages remains, and the result is as uncertain as any defense on this question is precarious.

The main defense started and remains on the question of the presence of negligence on the part of the carrier. The law is based on negligence only. *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492.

There is no presumption of negligence in the Act. Negligence must be proved. The weakness of this defense rests in the efficiency of the damage suit lawyer and depends upon the jury's decision under the facts adduced.

While this is a federal act, it is singled out as one preventing the removal to a federal court of a suit based upon it.

The carrier is relegated to the state tribunals under a law of federal parentage controlled by decisions of federal courts.

This narrative of the fate of the carriers' defenses during a period of ten years shows that the carrier has been more zealous than availing in its defense. The law has been strengthened against it by decisions, interpretations, applications and amendments. The carrier is not an insurer of the safety of its employees, and it might be radical to conclude that the only practical question left to the defense is the amount which must be paid. It is temperate to conclude that in view of the fate of its legal defenses the carrier must base his defense upon an intimate knowledge of the facts, upon an earnest effort to communicate the true facts to the jury, and upon the ultimate knowledge that final hope rests with the jury rather than the judiciary.

E. R. BLACK, in *The Memorandum.*

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"We may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught." Holmes, J., Slater *v.* Mexican Nat. R. Co., 194 U. S. 126.

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"The pole-star of devises [is] the testator's intention." Johnson, J., Finlay *v.* King, 3 Pet. 394.

## AVIATION AND THE LAW.

THE recent case of *The Königsberg* (116 L. T. Rep. 829; (1917) P. 174), in which the pilots and observers of two British aeroplanes were held to be entitled to participate in prize bounty awarded to the officers and crew of the two British monitors *Severn* and *Mersey* for destroying the armed German cruiser *Königsberg* in the Rufiji River, German East Africa, is one of the first notable cases in which the aeroplane has figured in the law reports. Topical as it may be at the present time, the case has a deeper significance than the mere development of an important military arm. Times are changing rapidly. At present the extremely rapid development of travel by air is bound up for the time being in warlike operations. But, startling as the proposition may appear, the war will not go on for ever. Aerial travel will not end with the war. The great development in aviation due to the war, when turned to the more beneficial uses of peaceful occupation, will give rise to important legal questions. At present few legal questions arise, for, all aerial activities being covered by the ægis of military necessity, etc., the civil aspect of the subject is entirely lost sight of.

If many thousands of aeroplanes are navigating the air over this country in a few years hence, are the ancient principles of the common law sufficient to define the relative rights and liabilities of those above and those below? That is the question to which we propose to address ourselves in this article. With that question we shall consider its correlative—namely, the nature of the modifications of the common law rules which will be required to keep pace with the development of aerial travel. As to this last we shall take care not to trench on the preserves of politicians.

There is a popular theory that every owner of land owns the column of air above his head. This is probably based on the old maxim *Cujus est solum ejus est usque ad coelum.* That was a popular maxim with Blackstone. There is only a limited amount of truth in the old maxim *Cujus est solum ejus est usque ad inferos.* The lower parts of the earth may in theory be the subject-matter of ownership. As Mr. Justice Littledale said in the case of *Lewis* v. *Branthwaite* (2 B. & Ad. 437), a freeholder has possession of the soil from the surface to the centre of the earth. Scientists tell us that the centre of the earth is mere molten matter, and that after breaking through the earth's crust—only a matter of some miles—there would be nothing but molten substance for the owner to exercise his ownership over. Yet this latter maxim for all practical purposes holds good as a highly convenient legal doctrine. Blackstone would put the other maxim on the same footing. After dealing with the "down" theory, he turns to the "up" theory. "Land hath also," he says (2 Bl. Com., book 2), "in its legal signification an indefinite extent, upwards as well as downwards." But he rather spoils the sweeping aspect of his words by giving as an illustration the rule that a man may not build so as to overhang his neighbor's land. In truth, the "up" theory has much less truth in it than the "down" theory, and even the "down" theory, as we have intimated, is mere theory.

It is conceived that the "up" theory, as we have called it, as boldly laid down by Blackstone, is unsound. The whole matter must be looked at from a different standpoint. Can it be said that when A. conveys to B. the piece of land, Whiteacre, that there passes to B. the boughs of C.'s trees which overhang the boundary between Whiteacre and C.'s lands and which trees grow on the latter's land? No; the matter has quite a different significance. The land passes to B., and with the land all the minerals under it and everything in the soil or growing on the soil. Why? Because all that is corporeal. True, air in a rela-

tive sense is corporeal. For that matter, so is water. Yet if there is a stream running through Whiteacre, passing from C.'s land on to or through Whiteacre and from thence, it does not matter where to, B. does not obtain the particles of water which happen to be passing through Whiteacre at the exact moment when the conveyance is executed. The ownership in those drops does not vest in B. All B. gets is the right to have the water coming freely to his land undiminished in quantity or quality by C. or any riparian owner higher up the course of the stream. If C. or any other higher riparian owner stops the water or pollutes it, B. has his right of action—not in trespass, but in nuisance.

Now, undoubtedly trespass and nuisance trench very close upon each other. If we were bold enough to lay down a distinction between these two, we would say that trespass was the wrongful interference with the possession of corporeal property, and nuisance is the wrongful interference with the enjoyment of corporeal property. The reader may remark that this is juggling with words. It is not. The distinction is fine, but the distinction is real. The late Lord Justice Vaughan Williams in the case of *Kine* v. *Jolly* (95 L. T. Rep. 656; (1905) 1 Ch. 480, at p. 487) said this: "An action of nuisance is different from an action of trespass. An action of trespass is the action which was brought where the body or the land of a person had been invaded. An action of nuisance is the action which was brought where there was no invasion of the property of somebody else, but where the wrong of the defendant consisted in so using his own land as to injure his neighbor's." If a man shuts out the light from his neighbor's windows by building on his own land, that neighbor, if he is entitled to an easement of light, has a right of action against him. This right of action is grounded on nuisance. If a man walks over his neighbor's field without justification, that neighbor can sue him for trespass. If, first, A., claiming a right of way over B.'s land, walks over B.'s land, A. sues B. in trespass. If, secondly, A. bars the way over his own land to prevent B. from crossing, B. sues A. in nuisance on the ground that he, B., has a right of way and A. interferes with B.'s enjoyment of it. In both of these latter cases the existence of the right of way comes into issue. If there is no right of way, B. in the first case is liable to A. in trespass, but if the court finds that there is a right of way the action fails, as B. has justified his act. In the second case, if there is a right of way, A. is liable on the ground of nuisance, because he has interfered with B.'s enjoyment of B.'s own property. Not, it will be observed, with B.'s physical possession of his own property, but with the enjoyment of a right appurtenant to B.'s own property.

The distinction we have drawn between trespass and nuisance appears to us to go to the very root of what forms the main subject of this article—namely, the right of A. to pass over B.'s property in an aeroplane. In this respect we may quote another apt passage from Lord Justice Vaughan Williams' judgment in *Kine* v. *Jolly* (*sup.*). " The action," said his Lordship, speaking of the action of nuisance, "in the popular as well as the precise legal sense of the word, would lie if a man so used his own land as to cause the air which passed over his neighbor's land, in which he had and could have no special right of property whatsoever, to be noxious and harmful." We may add that there is authority for the view that a man may cause an actionable nuisance to another in the enjoyment of the latter's property although the former has no land out of which the cause of the nuisance arises.

Lord Ellenborough expressed the opinion that it was not a trespass to interfere with the column of air superincumbent on the plaintiff's land. "I am by no means prepared to say," observed his Lordship, "that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*." In the case before the court—*Pickering* v. *Rudd* (1815, 4 Camp. 219)—the defendant nailed to his own wall a board overhanging the plaintiff's close. It was held that this was not a trespass for breaking and entering the close. "If this board," said Lord Ellenborough, "overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage." Lord Blackburn, then Mr. Justice Blackburn, in the case of *Kenyon* v. *Hart* (11 L. T. Rep. 733; 1865, 6 B. & S. 249) referred to Lord Ellenborough's remarks about the balloon, and said that he (Lord Blackburn) understood the good sense of Lord Ellenborough's doubts, although not the legal reason of it. Some passages to a contrary effect are contained in the judgment of Lord Justice Fry delivered in the case of *Wandsworth Board of Works* v. *United Telephone Company* (51 L. T. Rep. 148; 188 , 13 Q. B. Div. 904), where his Lordship said that, as then advised, he entertained no doubt that an ordinary proprietor of land could cut and remove a wire placed at any height above his freehold. But Sir William Brett, then Master of the Rolls, referred to the maxims we have cited above as mere fanciful phrases.

The effect of the authorities is, we submit, to show that an aeroplane passing over a man's land is no trespass unless the branches or leaves of the trees growing on the land or the chimney-pots of the houses standing on the land are hit by the machine. On the other hand, however, it would seem equally clear that if the proximity of the aeroplane caused nervousness and discomfort to the owner of the land or those properly upon the land, or caused his household some real discomfort and annoyance, either by reason of the noise or by reason of a fear of accident, the law would afford a remedy to the landowner and give him a right of action grounded on nuisance. This would be so where the passage was often repeated and at a low altitude. The cause of progress, scientific invention, modern developments, and so forth, do not justify the undue interference with the reasonable rights of ownership which are secured to the owner of land in this country at common law.

It must necessarily always be a question of degree. The passage of an aeroplane at a great altitude over the land of another does that other little or no hurt. The passage of such a machine at a low altitude, skimming the chimney-pots, disturbing the peaceful quiet, and frightening the livestock, not to mention human beings of reasonable nerve, is a very different thing. In the one case there could be little ground for nuisance; in the other there would seem to be every ground for the law to interfere. In present times, of course, civil rights are in substance and effect suspended. If damage is done, compensation may possibly be forthcoming. No jury would at present look with favor upon a plaintiff's claim in such matters. But, as we have said, the war will end some day, and the sky will be full, not with aeroplanes on military service, but with all kinds of aircraft plying for profit or pleasure, carrying passengers, no doubt, or even His Majesty's mails.

These considerations lead to the conclusion that it will become necessary to regulate by statute the user of the air by aircraft. Passage over crowded areas no doubt will be proscribed. Offenses of the air will be defined by statute. A reasonable margin of safety will be allowed to the mere earth inhabitant. How wide that margin may be must depend on many circumstances. The improved methods of aerial navigation will tend towards requiring less stringent regulations for the safety of those below.

There is another aspect of the question. Here we regard the matter from the point of view of the aeronaut—as Lord Ellenborough called him. If it becomes a recognized principle of

English law that the air is free for navigation by all who have the means of navigating it, then there might reasonably be some recognition of a right in the airman analogous to the very ancient right enjoyed by His Majesty's subjects when navigating the seas. There is no doubt that those persons who go down to the sea in ships and those who in pursuit of their trade navigate the sea may, if the necessity arises, justify their landing on the foreshore in times of danger through stress of weather. When our common law was in the making, aerial navigation was unthought of. But if a legal decision upholds the theory here put forward that the air is free to all who have the means of navigating it, subject only to the duty of avoiding actionable nuisances, then, logically, the King's subjects who take advantage of the facilities afforded by the progress of science might reasonably have extended to them the analogous right of landing at any reasonable spot in stress of circumstances. But, on the whole, we think that this would be too violent a step for the common law. No; if the airman is to be secured in this it must be by statute.

In the course of the next few years we may look for a new code of law—a new series of statutes, bearing such a title as the Aerial Navigation Acts, and the law reports will soon become filled with decisions on nice points arising on their construction. The time is not far off. Things may be all right as they are during wartime, but the advent of peace will call loudly for the regulation of the law of aerial navigation, for there can be little doubt but that the old common law rules are not fitted for the new order of things.—*Law Times.*

## Cases of Interest

NOTICE TO PASSENGER OF CHANGE OF CARS.—That an adult passenger is not entitled to be singled out for individual consideration and informed when and where it is necessary to change cars was held in St. Louis, etc. R. Co. *v.* Needham, 122 Ark. 584, 184 S. W. 47, reported and annotated in Ann. Cas. 1917D 486, wherein it appeared that an action was brought for damages occasioned by the fact that the carrier failed to inform the passenger that she should change at a certain point. The court said: "She was an adult, apparently of ordinary intelligence, and in full possession of her senses, therefore the carrier was not required to give her special notice of the necessity for a change of cars. All that the law required was that a suitable regulation be made for the convenience of passengers, and that reasonable steps be taken to bring those regulations to the attention of the passenger, no further individual notice being required."

APPLICATION OF SPEED REGULATIONS TO FIREMEN.—As a general proposition regulations governing the rate of speed of vehicles on public streets and highways are not applicable to fire apparatus on its way to a fire. But in Hubert *v.* Grangaw, 131 Minn. 361, 155 N. W. 207, reported and annotated in Ann. Cas. 1917D 563, it was urged that this rule should not apply when the firemen were on their way to a fire outside of the city to which they were not required to go. The court disposed of this contention by saying that if the firemen "respond to a call without the city, the same need for haste exists as when they respond to a call within the city: and for the same reasons they should not be required to observe the speed regulations in the one case more than in the other, unless the law expressly so provides. The statute in question contains no such provision. On the contrary, it expressly excepts 'fire wagons and engines' from the vehicles to which it applies, and this exception is absolute and unconditional."

REFERENCE TO EXPENSE OF IMPRISONMENT IN PLEA FOR DEATH PENALTY.—That justice should be tempered, not with mercy but with economy, was evidently the opinion of the prosecuting attorney in People *v.* Wilson, 216 N. Y. 565, 111 N. E. 243, reported and annotated in Ann. Cas. 1917D 272, wherein it appeared that the prosecutor in the lower court said: "Now there is no sense in burdening the state with this man if he is guilty of murder in the first degree. If you are satisfied that he is guilty of murder in the first degree there is no sense in doing that." Of this statement the court said: "We cannot understand how a prosecuting officer, with any true conception of the high duties of his office, could thus appeal to the jurymen to take into account the expense of maintaining a person in a penal institution as a consideration which should weigh with them in determining whether their verdict should be murder in the first degree, which would result in the defendant's death, or of some lesser degree of crime which would result in penal servitude."

ACCIDENT DURING RETURN FROM WORK AS ARISING OUT OF EMPLOYMENT.—The construction of the words "course of the employment" as used in a workman's compensation act was involved in John Stewart and Son *v.* Longhurst (Eng.) [1917] A. C. 249, reported and annotated in Ann. Cas. 1917D 196. It was therein held that a workman, who, after finishing his day's work on a barge, started to go home in the usual way over a private dock which he and his fellow workmen were permitted to use for that purpose, and fell therefrom and was drowned, was killed by an accident arising out of and in the course of his employment, Lord Frissley, C. J. saying: "The present case belongs to a class of cases where the thing on which the workman is employed is lying in a dock or other open space to which he obtains access only for the purposes of his work. Actual ownership or control by the employer of the spot where the accident occurred is not essential. The workman comes there on his way to and from his work, and he may be regarded as in the course of his employment while passing through the dock or other open space to and from the spot where his work actually lies. Such passage is within the contemplation of both parties to the contract as necessarily incidental to it."

LIABILITY FOR UNNECESSARY BURIAL AT SEA.—That an ocean carrier is liable to the next of kin of a passenger dying in the course of the voyage, for burying the body at sea when it is feasible to bring it to port for interment, was decided in the somewhat novel case of Finley *v.* Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715, reported and annotated in Ann. Cas. 1917D 726. Therein it appeared that a steamship passenger died at sea, the body was embalmed and put into such condition that it could have been carried to port, but after carrying it about four days it was cast overboard when the steamship approached tidal waters near Nantucket Shoals. In affirming a judgment for the plaintiff the court said: "Under the circumstances and the facts alleged in the complaint a reasonable discharge of the common-law duty required defendant to transport the body to the port of New York and deliver it to the parties entitled to the possession of the same for burial. At the time of the burial at sea the body could have been carried to port without injurious effect. Had the steamship been passing through the harbor of New York and approaching its dock, it could scarcely be said that the defendant would be justified in casting the body into the water from whence it could not be reclaimed, thereby depriving the next of kin of the solace of giving the body a decent burial on land."

VESTED RIGHT OF BENEFICIARY TO AWARD UNDER WORKMEN'S COMPENSATION ACT.—Some conflict exists among the few cases that have passed on the question whether the right of a dependent of a workman dying from an injury received in the course of his

employment to the allowance prescribed by a workman's compensation act is vested in the beneficiary, or whether it is personal and lapses on the death of the latter. In State *v.* Industrial Commission, 92 Ohio St. 434, 111 N. E. 299, reported and annotated in Ann. Cas. 1917D 1162, it was held that the right to compensation is vested in the beneficiary, and passes to his or her heirs or legatees, the court saying: "The precise question involved in this case has been before the courts of England, and it is the holding there, not only that an award of compensation to a dependent vests on allowance, but that the right to claim an award vests in the dependent at the time of death of the employee, and if dependent dies before presenting such claim the personal representative of a dependent may make the claim and recover upon it. While the English acts are different from ours in many respects, an examination of the cases to which we now refer and to the statutes will show that the same question was before the English courts as is presented by the instant case, and that practically the same reasons were advanced in opposition to the theory which the court adopted as are now advanced by counsel for the state."

CAN A MAN BE A PROSTITUTE?—Under the statute making it a crime to resort to a house of ill fame for "the purpose of prostitution" it was held in State *v.* Gardner, 174 Iowa 748, 156 N. W. 747, reported and annotated in Ann. Cas. 1917D 239, that a man cannot commit the offenses of resorting to a house of that character for the purpose specified in the statute. After some observations on the meaning of the term the court said: "Both 'prostitute' and 'prostitution' have such a fixed meaning in the approved usage of the language and such peculiar and appropriate meaning in law as that, if we give effect to such meaning, the statute in question does not contemplate that a man can be a prostitute or can practice prostitution, and does not intend to punish him for what he cannot do. For one cannot purpose to do what he knows is impossible. If a man cannot commit prostitution, he cannot go to a place for the purpose of prostitution. The words having acquired such meaning, and we have ascertained 'what is the appropriate and well authorized meaning of the term,' we should hold that 'in this sense the legislature is supposed to have used it.' State *v.* Ruhl, 8 Ia. at 453. The terms 'prostitution' and 'lewdness,' as used in the statutes, are, by a general rule of construction, to be construed according to their most usual and best understood signification."

EXECUTION AS AFFECTING PRIORITY BETWEEN JUDGMENT LIENS.—It has been almost uniformly held that as between several equal judgments the creditor who first issues execution gains priority with respect of the property held thereunder. But the contrary view was taken in Hulbert *v.* Hulbert, 216 N. Y. 430, 111 N. E. 70, reported and annotated in Ann. Cas. 1917D 180, which overruled two early decisions of the same jurisdiction, and, in holding that as between several judgments no one of which has priority over the others, no priority is gained by the issuance or levy of an execution, the court said: "Whatever the legal effect of the early statutes may have been it is perfectly clear that since 1813 the judgment itself is a lien upon the real property of the debtor. The legal effect of this statutory rule is that from the moment a judgment is duly filed and docketed legal rights in the real estate of the debtor attach. In the case now under consideration the liens of the three judgments attached simultaneously to the property of Hulbert upon his acquisition of the interest derived from his father. By virtue of the statute they were at that time equal liens entitled to share pro rata in the proceeds of the debtor's property. Such being the case, how can it be held that the issuing of the execution and the advertising by the sheriff—acts which would be an idle ceremony—should give a preference to the creditor? Once a lien is acquired it is a right which cannot be lost by the performance of an unnecessary act by another creditor."

LIABILITY FOR INJURIES TO INFANT STEALING RIDE ON VEHICLE.—The well-know proclivities of small boys for "stealing a ride" whenever opportunity offers, were responsible for the case of McCable *v.* Kain, 250 Pa. St. 444, 95 Atl. 574, reported and annotated in Ann. Cas. 1917D 378, wherein it appeared that the plaintiff was between twelve and thirteen years of age when he sustained the injuries complained of. He had climbed upon a passing dray which was loaded with heavy barrels and driven by a servant of the defendant, and was unobserved by the driver at the time, but the latter's attention being afterward attracted to him by some occurrence, he swung his whip around at the boy, and, according to the boy's testimony, struck him with the lash. The boy then attempted to get from the wagon, and in doing so was caught by one of the rear wheels and injured. Several witnesses testified to having seen the driver use his whip at the boy, none of whom, however, saw the lash strike him. The court held that it was an error to direct a verdict for the defendant, saying: "Technically the boy was a trespasser; he had gone upon the wagon uninvited. Had he been above the age of fourteen he would have been chargeable with contributory negligence in attempting to get upon a moving wagon in the manner he did; but because he was under that age the law will not impute to him an appreciation of the danger he ran in so doing, but leaves that question to be determined, not by the judge sitting in the case, but by the jury."

MATTER OF PUBLIC INTEREST AS PRIVILEGED WITHIN LAW OF LIBEL AND SLANDER.—A somewhat unique application of the doctrine of privilege attaching to defamatory words published with respect of a matter of public interest was involved in Adam *v.* Ward (Eng.) [1917] A. C. 300, reported and annotated in Ann. Cas. 1917D 249. Therein it appeared that a former army officer, speaking as a member of Parliament, made on the floor a charge of misconduct against an army officer with respect of proceedings which had led to the removal of the speaker and other officers from the service. The officer against whom the charge had been made appealed to the Army Council, which, after an investigation, made a report vindicating the accused officer and reflecting on the maker of the charges, and caused the report to be generally published in the press. The public importance of the subject was held to warrant the general publication of the report and rendered it privileged. Lord Finlay, L. C. saying: "That the occasion of this letter was privileged seems to me to be clear beyond all controversy. Major Adam had made a violent attack upon the character of Major-General Scobell, who appealed to the Army Council of inquiry. It was the duty of the Army Council to inquire into the truth of this charge and to make the result of that inquiry known as widely as possible. It is said that there was unnecessary publicity given to their findings, but it must be remembered that Major Adam's speech in the House of Commons had been extensively reported, as he obviously intended it should be when he made his attack upon Major-General Scobell, and the Army Council did no more than their duty in giving a wide publicity to their finding that the charge was unfounded."

INTERNMENT OF PERSONS OF HOSTILE ORIGIN OR ASSOCIATION.—Under the British Defense of the Realm Consolidation Act, providing that the King in Council has power during the present war to issue regulations for securing the public and the defense of the realm, it was held in Rex *v.* Halleday (Eng.) [1917] A. C. 260, reported and annotated in Ann. Cas. 1917D 389, that Parliament had conferred the power to make an order for the intern-

ment of persons of hostile origin or association. In a concurring opinion Lord Atkinson said: "It was also urged that this Defense of the Realm Consolidation Act of 1914, and the regulations made under it, deprived the subject of his right under the several Habeas Corpus Acts. That is an entire misconception. The subject retains every right which those statutes confer upon him to have tested and determined in a court of law, by means of a writ of habeas corpus, addressed to the person in whose custody he may be, the legality of the order or warrant by virtue of which he is given into or kept in that custody. If the legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if intra vires, do not infringe upon the Habeas Corpus Acts in any way whatever, or take away any rights conferred by Magna Charta, for the simple reason that the Act and these Orders become part of the law of the land. If it were otherwise, then every statute and every intra vires rule or by-law having the force of law creating a new offence for which imprisonment could be inflicted would amount, pro tanto, to a repeal of the Habeas Corpus Acts or of Magna Charta quite as much as does this statute of November 27, 1914, and the regulations validly made under it."

CONDITION IN POLICY OF AUTOMOBILE INSURANCE AGAINST CARRYING PERSONS FOR HIRE.—A clause in a policy of insurance on a motor car providing that the car should not be "rented or used for passenger service of any kind for hire was held in Crowell *v.* Maryland Motor Cars Ins. Co., 169 N. C. 35, 85 S. E. 37, reported and annotated in Ann. Cas. 1917D 50, not to authorize a forfeiture when the car was used on a single occasion by the owner's chauffeur without his knowledge to carry persons for hire, and was destroyed after the forbidden use had ceased, the court saying: "This machine was not kept for the purpose of being rented or used in the passenger service. It was the merest accident that it was used on this occasion, 'the other car which had been used for hire not being in the garage that morning.' This is what the witness Ben Stitt said about it, and, besides, when the car was burned the journey had been completed and all the parties had returned to the city by another car, the night before the burning, which was one of those unaccountable accidents, not attributable to any use of the car for carrying the parties to their hunting ground, so far as appears. The hire had been given up and the owner had resumed the possession of his private car, and placed it in the care of his servant to be brought back to the garage. We do not see, from the language of the policy, how such a case could have been intended by the parties as a ground of forfeiture. There was no increase of the risk which would be incurred by its ordinary and perfectly legitimate use as a private automobile, it being all the time in the possession of the plaintiff's chauffeur, and, at the time of the fire, in his exclusive possession and control. It seems to us that it would be too narrow and rigid a construction of the clause if we should hold that this single act of the chauffeur falls within its prohibition, and consequently involves a forfeiture of the insurance."

INJUNCTION AGAINST PUBLICATION OF FALSE POLITICAL MATTER.—Those who in these troublous times proclaim their adherence to the untrammelled right of free speech on any and all occasions may find some comfort in Hamell *v.* Bee Publishing Co., 100 Neb. 39, 158 N. W. 358, reported and annotated in Ann. Cas. 1917D 655. Therein it appeared that an injunction was sought to prohibit the publication of false or misleading political information. The court denied the injunction in view of a provision of the Nebraska Constitution that "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Commenting on the gradual growth of the liberty of the press the court said: "The powerful agency of the press in the evolution of just and efficient government and the indefensible restrictions imposed upon publishers were understood generally when provisions similar to those quoted from the Nebraska Constitution were inserted in the fundamental law of many of the states. In the light of history, some of the leading purposes disclosed by the language of the Constitution cannot be misunderstood. The power to exercise a censorship over political publications, as formerly practiced, is taken away. The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government. The truth when published with good motives and for justifiable ends, contrary to the doctrine of the Star Chamber, is a defense in an action for libel, either civil or criminal. It follows that a court cannot use its equity powers to prevent the publication of political matter merely on the ground that it is untruthful or misleading, its truthfulness and its publication for good motives and for justifiable ends being a defense in an action at law."

LIABILITY FOR INJURY TO PASSENGER FALLING OVERBOARD.—The rule by which a carrier by water is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit, is applicable to prevent injury to a passenger by falling overboard. This was affirmed in Hanley *v.* Eastern Steamship Corp., 221 Mass. 125, 109 N. E. 167, reported and annotated in Ann. Cas. 1917 C 1034, wherein it appeared that on a deck of the steamship where passengers were permitted to go, there was a space, variously estimated at from three to five feet between a lifeboat on one side and a life raft on the other, where there was no rail, guard or protection to prevent a passenger from walking, being thrown or falling over the ship's side to the water; that as the plaintiff's intestate, walking along at about half past nine o'clock in the evening with a camp stool in his hand, was in the act of putting it down, the vessel gave a lurch and he fell overboard. In affirming a judgment for the plaintiff the court said: "There were several hundred pasengers on this boat and necessarily some degree of inspection was required, in the exercise of the high responsibility resting upon the defendant as a common carrier, to see that the various parts and appointments of the vessel remained safe and were not put out of place or rendered dangerous by such ignorant or stupid persons as commonly might be anticipated among so large a number of passengers. The defendant was not obliged to act on the theory that passengers wilfully would remove guards placed for their protection; but, if the peril that was disclosed by the accident was one likely to occur, then the defendant would be required to provide against it, so far as reasonably possible. It properly was left to the jury to determine whether such reasonable inspection as the defendant ought to have exercised, in view of the number of passengers carried and the nature of the particular place and its fittings, and the danger likely to follow from its becoming unguarded, would have revealed the fact that the guard chain had become unfastened."

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"The doctrine . . . that in war, poison and every species of fraud may rightfully be used, has received the general condemnation of mankind." Wayne, J., U. S. *v.* Castillero, 2 Black 367.

# News of the Profession

NEW CITY JUDGE IN INDIANA.—Adolph F. Decker of Evansville, Indiana, has been appointed city judge of that city to succeed the late Judge Rudolph Fritsch.

RESIGNATION OF ASSISTANT UNITED STATES ATTORNEY.—Elijah Barton of Minneapolis has resigned from the office of assistant United States attorney for Minnesota.

NAMED CHIEF JUSTICE.—Judge John Kivel of Dover has been appointed by Governor Keyes of New Hampshire to be Chief Justice of the Superior Court, succeeding the late Robert N. Chamberlain.

NEW UNITED STATES ATTORNEY IN ARKANSAS.—Judge Emon R. Mahoney of El Dorado has been appointed United States attorney for the western district of Arkansas, to succeed J. V. Bourland.

FORMER LAW PROFESSOR DEAD.—Talcott Huntington Russell, a leading Connecticut lawyer, and for a number of years professor of law at Yale Law School, died at New Haven, Conn., on October 22.

NEW ASSISTANT SECRETARY OF TREASURY.—James H. Moyle, a prominent Utah lawyer, has been appointed assistant Secretary of the Treasury to succeed Byron Newton, now collector of the port of New York.

FORMER PANAMA JUDGE DEAD.—Wesley M. Owen, associate judge in the Panama canal zone during the second administration of President Roosevelt, died at Bloomington, Ill., on October 16, aged 48 years.

NAMED CIRCUIT JUDGE.—Governor Brough of Arkansas has appointed John W. Wade of Little Rock to succeed the late Judge R. J. Lea on the bench of the First Division of the Circuit Court, Sixth Judicial District.

VETERAN IOWA JURIST DEAD.—District Judge Charles A. Dudley, the oldest practicing lawyer in Iowa, died at Des Moines, Ia., on October 18, aged 78 years. Judge Dudley was appointed to the bench in 1912.

APPOINTED TO BENCH IN WASHINGTON.—Calvin S. Hall of Seattle has been appointed by Governor Lister of Washington to succeed the late Judge Robert Brooke Albertson as judge of the superior court of King county.

NOTED NEW ORLEANS JURIST DEAD.—Henry Lawrence Lazarus, one of the best-known members of the Louisiana bar and formerly judge of the civil district court at New Orleans, died at that city on November 2, aged 64 years.

APPOINTED TO DISTRICT BENCH IN SOUTH DAKOTA.—W. N. Skinner of Castlewood has been appointed by Governor Norbeck of South Dakota as judge of the third judicial district to succeed Judge Carl Sherwood, resigned.

DEATH OF MASSACHUSETTS JUDGE.—Associate Judge John Henry Hardy of the Massachusetts Superior Court died at Arlington, Mass, on October 15, aged 70 years. Judge Hardy was appointed to the bench by Governor Wolcott in 1896.

WYOMING JUDICIAL APPOINTMENT.—Charles E. Blydenburgh of Rawlins has been appointed by Governor Houx as associate justice of the Supreme Court of Wyoming to fill the vacancy caused by the death of Judge Richard W. Scott.

VETERAN POLITICAL LEADER DEAD.—General Charles Henry Grosvenor, for twenty years a member of Congress and during the greater part of his life a leader in Republican politics in Ohio, died at Athens, O., on October 30, aged 85 years.

APPPOINTED SUPERIOR COURT JUDGE.—Thomas L. Marble of Berlin has been appointed to the bench of the New Hampshire Superior Court to fill the vacancy caused by the elevation of Judge John Kivel to the position of Chief Justice.

DEATH OF PROMINENT OHIO ATTORNEY.—Judge Oliver H. Hughes, chairman of the Ohio public utilities commission, died at Columbus, Ohio, on October 28, aged 52 years. For many years Judge Hughes had been prominent in Ohio political circles.

APPOINTED TO NEW YORK SUPREME COURT.—Governor Whitman of New York has appointed Leander B. Faber of Jamaica to fill the vacancy on the bench of the Supreme Court, Second Judicial District, caused by the death of Judge Carr of Brooklyn.

EMINENT KENTUCKY LAWYER DEAD.—Theodore L. Burnett, an eminent Kentucky lawyer, former county judge of Taylor county and believed to be the last surviving member of the Confederate Congress, died at Louisville, Ky., on October 30, aged 88 years.

MISSOURI PROBATE JUDGES.—The fourth annual meeting of the Association of Probate Judges of Missouri was held at Kansas City, Mo., on October 22 and 23. Judge A. B. Duncan of St. Joseph was elected president of the association for the ensuing year.

DEATH OF MICHIGAN JUDGE.—Circuit Judge Philip T. Van Zile of Detroit died at that city on October 29. He was born in Pennsylvania in 1844. In 1878 he was appointed United States district attorney for Utah and was prominent in the prosecution of Mormon cases.

NAMED ASSISTANT JUDGE.—James Donahoe has been appointed by Governor Lowden of Illinois as assistant judge of the Municipal Court of Chicago. His appointment came after a fight of three years against Aaron Heep, who has occupied the bench, concerning election returns.

DEATH OF ARKANSAS JUDGE.—Robert James Lea, judge of the Arkansas Circuit Court, First Division, for the past twenty-six years, died at Little Rock, Ark., on October 11, aged 65 years. Judge Lea at the time of his death was serving his seventh successive term on the bench.

PROMINENT MISSISSIPPI ATTORNEY DEAD.—Former Circuit Judge C. L. Dobbs, of the Eighth Judicial District of Mississippi, died at Meridian, Miss., on October 28. Judge Dobbs was one of the most prominent men in the state and was at one time Secretary to the late Senator H. D. Money.

CALIFORNIA JUDGE DIES.—Judge James M. Seawell, one of the oldest and best-known Superior Judges in California, died at San Francisco on October 20, aged 81 years. Judge Seawell had been on the Superior Court bench continuously from 1892 to the day of his death.

TEMPORARILY APPOINTED TO BENCH IN MICHIGAN.—Clyde I. Webster of Detroit has been appointed by Governor Sleeper of Michigan to fill the vacancy on the circuit court bench caused by the death of Judge Philip T. Van Zile. Mr. Webster will succeed to the office by election on January 1.

TENNESSEE JURIST DEAD.—David L. Snodgrass, former chief justice of the Tennessee Supreme Court, died at Chattanooga, Tenn., on October 10, aged 66 years. Judge Snodgrass was first elected to the Supreme Court bench in 1886, and in 1894 succeeded Judge Horace H. Lurton as Chief Justice.

SPECIAL ASSISTANT FEDERAL ATTORNEY RESIGNS.—Frank C. Dailey, former United States attorney at Indianapolis and recently appointed by Attorney General Gregory as special assistant to prosecute the I. W. W. members indicted in Chicago for anti-war activities, has resigned, and Claude R. Porter of Des Moines has been appointed to fill the vacancy.

DON M. DICKINSON DEAD.—Don M. Dickinson, Postmaster General under President Cleveland, a noted lawyer, and leader of the Democratic party in Michigan, died at Trenton, Mich., on October 15, aged 71 years. Mr. Dickinson was appointed senior counsel of the United States in the famous case of the Bering Sea claims, argued before the International High Commission in the fur seal arbitration of 1896 and 1897, and was the American member of the Court of Arbitration in 1902 to adjust a controversy between the United States and the Republic of San Salvador, arising from a claim against the Central American republic presented by an American company which had a concession for the collection of port duties in San Salvador.

## English Notes*

LONGEVITY AMONG THE JUDICIARY.—The attainment by Lord Halsbury on September 3, of his ninety-fourth birthday, in full possession of his mental and physical faculties, naturally recalls some instances of longevity in the cases of eminent members of the judiciary. Vice Chancellor Bacon was born in 1798, died in 1895, and was on the Bench till 1886. The Right Hon. Thomas Lefroy, Lord Chief Justice of Ireland, was born in 1776, discharged his judicial duties till he had entered on his ninety-first year in 1866, and lived until 1869. Lord Chancellor Plunkett lived till his eighty-ninth year. Lord St. Leonards was ninety-four, Lord Lyndhurst ninety-one, and Lord Brougham eighty-nine at the time of his death. Lord Campbell broke the record in being appointed Lord Chancellor for the first time in 1859, when past eighty; and in Ireland the Right Hon. Francis Blackburne, who had been successively Master of the Rolls, Lord Chief Justice of Ireland, Lord Chancellor, and Lord Justice of Appeal, was in 1886 reappointed to the Lord Chancellorship of Ireland in his eighty-sixth year.

THE DISABILITIES OF A SOLICITOR IN CONTEMPT.—There was what the daily newspapers have described as a "sensational scene," between the Recorder of Derry and a solicitor practising before him in the Recorder's Court, Derry, recently. A particular case being reached, the solicitor for the plaintiff rose to address the court, when the learned recorder informed him that he could not be heard as he was in contempt since the previous sessions. For some ten minutes there was a dialogue between the judge and the advocate, and in the end the latter was forcibly ejected from the court by a police constable by direction of the court. The case was then recalled, and the judge offered to the plaintiff to go on without a solicitor, or to grant a short adjournment to permit another solicitor to be instructed, or to adjourn to the next sessions. The solicitor for the defendant asked to have the latter course taken, and His Honour accordingly adjourned the hearing of the case till January. Meantime it is more than probable, the incident will come before the High Court of Justice for consideration in some form or other, and it will be useful to have a clear decision on the rights of advocates in the County Court. There is, no doubt, some authority for the proposition that a person in contempt cannot be heard by the court till he has purged his contempt; but in the case of Rex *v.* Sheridan (11 I. L. T. 31), in the Recorder's Court in Dublin, the privilege of counsel who was in contempt to appear for and defend a prisoner was successfully insisted on. If a solicitor in contempt represented a defendant, and the plaintiff insisted on the case being heard, the court would be placed in an unquestioned difficulty in refusing audience to the defendant's attorney and deciding the case against him.

INTERFERENCE BY AMBASSADOR IN DOMESTIC AFFAIRS.—The nearest approach in misconduct on the part of an ambassador to the attempts of Count Bernstorff, the German Ambassador at Washington, as disclosed by a message sent by him in January, 1917, to the Berlin Foreign Office, to corrupt the Congress of the United States is the case of Yrujo, the Spanish Ambassador to the United States, more than a century ago, says the *Law Times*. In 1804, the recall of the Spanish Minister Yrujo was demanded on account of an attempt made by him to bribe a Philadelphian newspaper to advocate the Spanish view of the boundary question then in controversy with the United States. The Government of the United States has been a strict upholder of the proprieties which preclude ambassadors from any effort, even if such effort bear no dishonorable aspect, to influence the current of domestic affairs in the country to which they are accredited. In 1855 it was held by that Government in the case of Sir Cecil Crampton, the British Ambassador, that a foreign Minister who engages in the enlistment of troops in the United States for his Government is subject to be summarily expelled from the country, or, after demand of recall, dismissed by the President. So, too, in 1888, shortly before the Presidential election, a person, professing to be a British-born subject, wrote to the British Minister at Washington, Lord Sackville, asking him to advise the writer "privately and confidentially" how he should vote, and to inform him whether, in his opinion, Mr. Cleveland would, if re-elected, pursue a policy friendly to England. Lord Sackville fell into the trap, and replied in a letter, promptly published, which made him at least technically liable to the charge of interfering in the internal affairs of the country. Upon that state of facts his recall was demanded, and, when his Government failed to comply before it had received any explanation from him, he was given his passports and dismissed within three days. The just indignation of the United States at the latest exposure of German diplomatic treachery and breach of the laws of international comity, may be gauged by the sensibility of its Government in minor derelictions of duty on the part of foreign Ministers.

"A LEAGUE OF KINGS."—The Right Hon. Arthur Henderson, speaking with the authority and prestige of a former member of the War Cabinet, on September 6, at the Labor Congress at Blackpool, said: "The Kaiser has endeavored to form a league of kings that they might fight against the democracy of the world." To this statement the series of telegrams exchanged between the Kaiser and the Czar, now published in the Paris edition of the *New York Herald*, and the treachery of the ex-King of Greece, Constantine, in intriguing with the Kaiser in the endeavor to undermine the policy of his Prime Minister, would, taken alone, afford conclusive proof. Mr. Henderson's charge does not impute to the Kaiser a crime without parallel

*With credit to English legal periodicals.

in history. The idea of the Emperor of Russia of the day of uniting Austria, Prussia and Russia in the mystic bonds of the Holy Alliance formed at Paris in 1815 is closely analogous to the idea of the Kaiser, according to the view of Mr. Henderson. This combination, to which France gave her adhesion in 1818 in the Congress of Aix-la-Chapelle, was formed on the basis that, as the interest of these Powers were one and indivisible, they should act together as a unit, lending "one another on every occasion and in every place assistance, aid and support." At Verona in October, 1882, the Holy Alliance, so named because it was signed in triplicate by the sovereigns, with the words, *Au nom de la très sainte et indivisible Trinité* prefixed, developed into "a league of kings to fight against the democracy of the world." By a secret treaty the ultimate object of the Holy Alliance was embodied in a mutual agreement not only "to put an end to the system of representative government in Europe," but also, "to destroy the liberty of the press." Such was the nature of the league really formed for the protection of the principle of legitimacy against the then rising tide of popular freedom. The analogy, amounting almost to a parallelism, between the Holy Alliance of the second decade of the nineteenth century and the Kaiser's ideal of a league of Kings does not end here. When the Holy Alliance attempted to extend its policy to the New World, the resistance opposed to it by the United States is embodied in what is generally known as the Monroe Doctrine. It is in accordance with the rational development of that doctrine as explained and expounded by President Wilson, that the United States has been constrained to enter this war against a league of kings fighting against the democracy of the world.

THE OFFICE OF COMMON SERJEANT, which Sir F. A. Bosanquet has resigned, is one of great antiquity, being traceable as far back as 1311. In early times the Common Serjeant appears to have been sometimes designated as the Common Counter, and till a late date his duties were more those of an advocate than of a judge. More recently his judicial duties have increased and have almost completely overshadowed those other functions which he has still on occasion to undertake. Till the passing of the Local Government Act 1888, the Common Serjeant was appointed by the Common Council, but by that statute the appointment is now vested in the Crown, the privilege of fixing the salary and defining the duties of the office still remaining with the corporation. At one time the tenure of the office did not preclude practice, but for many years the rule has been otherwise. Denman, afterwards the Chief Justice, it may be recalled, held for some years the office of Common Serjeant, the emoluments of which, although then only amounting to about £1400, he found extremely useful, as, by reason of the refusal by the King to give him a silk gown, he did not have that position in the Profession to which his merits entitled him. According to Pulling's Order of the Coif, the custom prior to Denman's appointment was for the senior of the four Common Pleaders in the Mayor's Court to be elected Common Serjeant, and in 1822, when the election took place, Denman had Bolland, the then senior Common Pleader and afterwards a Baron of the Exchequer, as a formidable competitor. Denman wrote of Bolland as "one of the most blameless and honorable men living," and looking back on the result of the contest, he said that Bolland's defeat, "though an unexpected and severe blow after his long connection with the City with a view to that very object, never interrupted the pleasant terms on which we had lived." For over a century and a half the name of the Common Serjeant for the time being has been inserted in the commission of oyer and terminer and gaol delivery at the Old Bailey, and it is inserted in the Act of Parliament which established the Central Criminal Court (4 & 5 Will. IV, c. 36). Acording to Pulling, the holder of the office, when its tenure was not incompatible with private practice, was junior to members of the Order of the Coif, but he had precedence of ordinary barristers.

MEMBERS OF PARLIAMENT AND THEIR CONSTITUENCIES.—The London *Times* in a recent article entitled "The M. P.'s First Duty," "hopes that among the many useful changes wrought by the war it will do something to restore an older Parliamentary tradition when members were truly representative of the particular constituencies which elected them. It was a tradition more easy to follow, no doubt, in the days when the countryside was inevitably represented by one or other of two rival squires, and the well-known local manufacturer was not too busy to stand for his town." This account of the practice in days gone by of returning local men for constituencies leaves entirely out of sight the system of nomination boroughs, and ignores the fact that from a very early period indeed attempts to secure local men for Parliamentary seats met with little success. The first statute of Henry V. expressly ordained that residence was a necessity for both electors and elected in counties and in boroughs. This statute was suffered to be absolutely obsolete for centuries, and was at last removed from the statute book in 1774 (12 Geo. III, c. 20). Mr. Hallam thinks that the old custom was that each county, city, or borough should elect deputies out of its own body resident among themselves, and consequently acquainted with their necessities and grievances. He thinks it likely that the practice of electing non-residents had begun in the reign of Edward III. He remarks on this statute of Henry V. that it apparently indicates a point of time when the deviation from the line of law was frequent enough to attract notice and so established as to pass as an unavoidable irregularity. "There cannot be a more apposite proof of the inefficiency of human institutions to struggle against the steady course of events than this unlucky statute of Henry V., which is almost a solitary instance in the law of England wherein the principle of desuetude has been avowedly set up against an unrepealed enactment." The practice of the owners of nomination boroughs in keeping the members of these boroughs from all acquaintance with their constituents has been the subject of considerable recent comment. The relations in those cases between members and constituents were identical in Great Britain and in Ireland. Mr. Thomas Sheridan, speaking in the Irish House of Commons, said: "Are there not many among us who could not find the way to the place they represent; who were never in a borough; who at times cannot recollect the name of it?" "What shall we say," said Sir Lawrence Parsons in the Irish House of Commons, "that we have been doing when we go back to our constituents? I ask pardon. I forgot. A majority of this House never go back to their constituents. They do not know them. They do not live among them."

AUTOMATIC MACHINES AND UNLAWFUL GAMING.—However technically correct it may be, it cannot but strike one as drolly grandiloquent to charge a person with "unlawful gaming" or for betting and for keeping a place as a "common gaming-house," when the alleged gaming is effected through the medium of an automatic machine of the kind that was erected in the confectioner's shop in the recent cases of Rex *v.* Peers and Rex *v.* Brown (116 L. T. Rep. 830), entitling any skilful operator thereon to receive twopennyworth of sweets from the shop. *De minimis non curat lex* has nevertheless its limits. And section 1 of the Betting Act 1853 (16 & 17 Vict. c. 119)—"An Act for the suppression of Betting Houses"—no more than the

Gaming Houses Act 1854 (17 & 18 Vict. c. 38), must on no account be allowed to fall into abeyance. Moreover, the fixing of automatic machines of this particular description in every available situation throughout the kingdom has become so general that the statutory breach has assumed dimensions that needed to be dealt with. In the present case, by the insertion of a penny in the automatic machine, certain machinery was put into motion which, if successfully manipulated, resulted in the depositor of the penny obtaining a disc whereby he was permitted to claim the great reward before alluded to. The decision of the Divisional Court, dismissing the appeals against the conviction for contravening the Acts heretofore mentioned, was based on grounds which will probably convince the reader as being absolutely sound in all respects. As the Lord Chief Justice pointed out when delivering the judgment of the court, the true test is whether the shop in question is kept for the purpose of the proprietor receiving money "as or for the consideration for any . . . promise . . . to pay or to give thereafter any money or valuable thing" in a certain event. That is the language of section 1 of the Betting Act 1853, within the literal terms of which the learned Lord Chief Justice considered that no one could deny that the present case could be brought. In laying down that the skill of the players is not necessarily the deciding factor in the case, a shrewd blow is struck at the contention which is always urged in such cases as the present that if a game is one of skill, or involves a substantial amount of skill, a conviction under the Gaming Houses Act 1854 cannot be upheld. But in the words of the learned judge, anyone who exercises his skill for the purpose of winning a stake comes within the Betting Act 1853, just as much as if he depended on another person's skill or mere chance. In the case of an offense under that Act, it is immaterial whether the game is one of skill or not. This is contrary to the opinion that was expressed in the Scottish case of Macintosh *v.* Granata (53 Sc. L. Rep. 766), where the dissentient judgment of Mr. Justice Lush in Peers *v.* Caldwell (114 L. T. Rep. 609) was approved. All the same, it seems to be an eminently reasonable view of the matter.

FINALITY OF AWARD IN WORKMEN'S COMPENSATION CASE.—The result of the authorities was succinctly summed up by Lord Justice Bankes in the recent case of Linthorpe Dinsdale Smelting Company Limited *v.* Hoy, when he said that the extent of the finality which must be attached to awards in workmen's compensation cases is thus to be tested: Is the case one in which the weekly payment is open to review under section 16 of the first schedule to the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58)? And to justify that it is necessary to show some change of circumstances between the date of the award and the date of the application to review. The learned judge went on to add that any attempt to define what constitutes "change of circumstances" would be very unwise, because they may vary to an almost indefinite extent. But, as his Lordship remarked, instances can be found in the various reported cases of what has been held from time to time to constitute a change of circumstances—e.g., the consequences of the accident having passed away—and what has been held to fall short of that requirement. Certainly, in the present case the employers failed to satisfy the learned judges of the Court of Appeal, as they had the learned County Court judge, that any change of circumstances had taken place. When once the facts of the case were ascertained, practically the same medical evidence was relied on by the employers at the hearing of their application to review the weekly payment as had been tendered by them at the hearing of the workman's application for an increase of compensation. Such medical evidence sought to prove, in effect, that the workman was suffering from a disease—i.e., rickets or coxavara, a softening of the neck of the femur—and not from the results of an accident. If that had been substantiated, manifestly the employers would have had to be exonerated from all liability to continue to pay the workman compensation. For if his condition were the consequence of a disease—and that not one of those specified in the third schedule to the Act and known as "industrial diseases"—and not of the accident with which he had met, the workman's claim against the employers was bound to be rejected by the arbitrator. But the outcome of that course was to ask one County Court judge to accept at a second hearing in 1917 what had been refused by another judge to be accepted at the first in 1915—an obviously hopeless task. And inasmuch as the Court of Appeal declined to accede to the contention that the employers were entitled to assert that, though in 1915 the workman's incapacity for work was due to the accident, yet in 1917 such incapacity as there was was not due to that cause, the employers' appeal had no chance of success. The decision is highly instructive in cases where estoppel and res judicata are the pleas on which such cases are open to be determined.

DESTRUCTION BY FIRE OF GOODS LEFT TO BE WORKED ON BY BAILEE.—The facts on which turned Mr. Justice Avory's decision in the recent case of Shaw and Co. *v.* Symmouns and Sons (117 L. T. Rep. 91) may so frequently have their exact parallel in subsequent cases—to say nothing of those in which in analogous circumstances that decision would precisely apply—that a close consideration of the conclusion arrived at by the learned judge will probably repay the reader. Of the various descriptions of bailments, as classified by Lord Holt in the famous case of Coggs *v.* Bernard (Ld. Raym. 909), that in which services have to be performed or bestowed on the goods of the bailor—*locatio operis faciendi* as it is usually styled—is undeniably much more general than any other, for goods are left from time to time to be worked on in one form or another by almost everybody. And the degree of care in connection with the bailment required to be exercised, the reader will call to mind, is ordinary diligence on the part of the bailee, he being liable for ordinary neglect, inasmuch as the bailment operates for the benefit of both parties thereto. The question, therefore, whether failure to return the goods deposited within a reasonable time after being required to do so by the owner thereof will take the case outside the protection afforded by section 86 of the Fires Prevention (Metropolis) Act 1774 (14 Geo. III, c. 78) is of the most far-reaching importance. Despite all precaution and care, accidental fires will constantly occur. The effect of destruction by fire through a breach of contract to deliver within a reasonable time goods deposited for the purpose of having something done to them is, consequently, of great interest to the public at large. That no authority quite on all fours with the present case was capable of being cited is perhaps a little surprising. For the neglect to return books sent to be bound, boots and other articles of attire sent to be repaired, *et hoc genus omne*, within a reasonable time is an experience that is common to most persons. And every now and again the retention of such goods is doubtless unfortunately followed while the bailment continues by their being consumed by fire. Presumably, however, the bailee, having had foresight enough to insure against fire everything on his premises, makes no objection to payment over to the bailor of the value of his goods that have been burnt. In the present case, reluctance on the part of the defendants to make good to the plaintiffs the damages occasioned by the loss of their goods gave rise

to the question with which Mr. Justice Avory was called upon to deal. His Lordship relied on the principle of the decisions in Davis *v.* Garrett (6 Bing. 716, at p. 724) and Lilley *v.* Doubleday (44 L. T. Rep. 814; 7 Q. B. Div. 710), approved in Royal Exchange Shipping Company *v.* Dixon (56 L. T. Rep. 206; 12 App. Cas. 11, at p. 19), and more recently in Morrison and Co. *v.* Shaw, Savill and Albion Company (115 L. T. Rep. 508; (1916) 2 K. B. 783). The learned judge, quoting the words of Chief Justice Tindal in Davis *v.* Garrett (ubi sup.)—"as a loss has actually occurred whilst his wrongful act was in operation and force"—decided in favor of the plaintiffs.

SALARY CLAIMED BY SERVANT DISMISSED FOR MISCONDUCT.—The notion that a servant who is dismissed from his employment on the ground of his misconduct thereby forfeits any salary or wages that may be due to him is one not infrequently to be met with. It is probably entertained because dismissal may forthwith follow misconduct, even depriving the servant of his right to receive notice of the termination of his employment. As he loses that right, so likewise it is doubtless supposed he is constrained to forego whatever would otherwise be owing to him in the shape of remuneration for his services. The fallaciousness of that idea is, however, made abundantly clear by the considered judgment that was delivered by Mr. Justice Avory in the recent case of Healey *v.* Société Anonyme Française Rubastic (117 L. T. Rep. 92). The defendant company in that case contended that it was a condition precedent to the right of the plaintiff—who had been employed as their managing director and had been dismissed from his employment on the ground of his misconduct in certain periods anterior to the date when it ultimately came to light—to payment of his salary that he should truly and faithfully serve his employers. Having failed in the performance of that condition he was not, it was argued, entitled to recover his salary from the time of the last payment thereof up to the date of his dismissal. The only authority that was cited to the learned judge in support of the defendant company's contention was, as he stated, a decision of Lord Tenterden referred to in a note in Turner *v.* Robinson (6 C. & P. 16). But the decision as there reported appeared to his Lordship to be inconsistent with the decision of the Court of Appeal in Boston Deep Sea Fishing and Ice Company, Limited *v.* Ansell (59 L. T. Rep. 345, 39 Ch. Div. 359). Mr. Justice Avory thought that the answer to the defendant company's contention was that the contract of employment was in fact existing up to the time of the dismissal of the plaintiff, and that the right to determine it by reason of antecedent misconduct subsequently discovered did not entitle the defendant company to treat it as determined from any earlier date. The plaintiff was held, therefore, to be entitled to recover his salary for the months that he actually served. The outstanding feature of the present case, it will be observed, was that the misconduct on the part of the plaintiff which was complained of by the defendant company actually occurred at a period considerably earlier than the date of his dismissal. Seemingly, that was so because, although the misconduct was suspected to some extent, it was not definitely substantiated. There was, consequently, some color, perhaps, for the proposition on which the defendant company's objection to pay the plaintiff his arrears of salary was based. But in a case where dismissal follows immediately on misconduct, there is even less foundation for any such objection.

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## Obiter Dicta

SIMPLY HAD TO SUE.—Duty *v.* Jones, 123 Ark. 46.

BEATING THE GIANTS.—Sox *v.* Miracle, 35 N. Dak. 458.

MUST HAVE BEEN SOUR.—Face *v.* Cherry, 117 Va. 41.

NOT SO WISE.—In Wisdom *v.* Whitaker, 114 Ga. 500, the plaintiff lost all through the courts.

ONLY KIDDING.—In Kid *v.* Currie, 139 La. 685, the plaintiff was declared to have no cause of action.

STILL SELLING.—In Bolen *v.* Still, 123 Ark. 308, the plaintiff tried in vain to put the defendant liquor dealer out of business.

NO EAR FOR MUSIC.—In Drum *v.* Miller, 135 N. C. 204 it was held that the plaintiff should not have been beaten in the trial court.

THE VALUE OF VALUE.—In Value *v.* State, 84 Ark. 285, the appellant was convicted of having received a bribe of "fifteen dollars, lawful money of the United States."

CALIFORNIA FEET.—In United Railroads *v.* Superior Court. 172 Cal. 80, an action originally brought against the City of San Francisco, Judge Henshaw said with reference to an argument by counsel for the plaintiff: "Thus a very narrow shoe is elastically stretched to fit the defendant's very large foot." Query: Does the size of a municipality's feet depend on the size of the feet of the inhabitants thereof?

HOARY SLANG.—It seems that some of our choicest current slang phrases have not even the merit of originality. Fifty years ago, Baron Martin of the English Court of Criminal Appeal interrupted counsel arguing before him with the following remark: "The only question is whether there was any satisfactory evidence to go to the jury as to the girl's age; and surely when a mother says that her child was ten years old last March that was some evidence."—See Reg. *v.* Nicholls, 10 Cox Cr. Cas. 476.

A HEATHEN COURT.—Montana is evidently a fertile field for missionary work. Said the Supreme Court of that state in Matter of Colbert, 51 Mont. 468: "The state insists that under these circumstances, with nothing to explain them, the Bible was not admissible. The learned trial judge in receiving it said: 'I will admit it in evidence; what weight I will give it is a matter for future consideration. I don't like the looks of it.' With this attitude we are in entire accord."

THE BITER BIT.—At a trial in Baltimore a youthful physician was summoned as a witness, and on his cross-examination a lawyer seized the occasion to be sarcastic, says the Chicago

*Herald.* "Are you," demanded the lawyer, "entirely familiar with the symptoms of concussion of the brain?" The young physician replied, "Yes, sir; I am." Then the lawyer put a hypothetical case before the doctor in this way: "If my learned friend, Mr. Reid, and myself should bang our heads together, would we get concussion of the brain?" The young physician calmly replied: "Mr. Reid might."

HIS LAST MISTAKE.—The case of Broome *v.* Davis, 87 Ga. 584, was tried in the Superior Court before Judge Lumpkin. While an appeal to the Supreme Court of Georgia was pending Judge Lumpkin became a member of the latter court. Judge Lumpkin's decision was reversed by the Supreme Court, and Chief Justice Bleckley, writing for the court, prefaced his opinion as follows: "Before the translation of our Brother Lumpkin to this bench, though his judicial accuracy was remarkable, he shared in the fallibility which is inherent in all courts except those of last resort. In some rare instances he committed error, and the very last of his errors is now before us for correction."

JUDICIAL COOKERY.—In Evans *v.* Doolittle, 35 S. Dak. 604, an action involving the sufficiency of the description in a tax deed, Smith, J., in his dissenting opinion, remarked: "The letters and figures 'SEI/4, 32-121-67,' are legally meaningless in themselves, unless accompanied by words or abbreviations which make it apparent that they refer to some section, township, or range. My colleagues humorously suggest that these letters and figures refer to land, and to 'pie,' but the letters and figures themselves mean just as little in one case as in the other, and I think I may safely say the man who is permitted to acquire a title to land under such a tax deed is being handed a large and luscious piece of pie."

EXPLODING THE DUAL CAPACITY DOCTRINE.—In Spain *v.* Oregon-Washington R. etc., Co. 78 Oregon 355, the court knocked the props from under one of the defendant's arguments as follows: "It is impossible to separate the peace officer from the conductor when the duties of both are vested in the same person, and practically the same duty is required in each capacity. 'I swear as a private person and not as a bishop,' said a cleric when reproved by the king for profanity. 'But,' said the king, 'if the private person goes to hell for swearing, what becomes of the bishop?' So, if the conductor negligently or wilfully assaults a passenger or expels him from the train, what becomes of the peace officer wearing the same skin?"

QUALIFIED FOR THE BAR.—The late John G. Johnson, the famous Philadelphia lawyer, was once explaining to a jury the nature and the unfairness of "leading" or guiding questions, says the Black River Falls (Wis.) *Banner.* He illustrated his explanation with an anecdote.

"A young chap and a pretty girl," he said, "sat on a secluded bench at Lemon Hill. The girl turned to him and said earnestly:

"'You asked me for a kiss. There is a language in kisses. A kiss on the hand denotes chivalrous respect. On the forehead it denotes a firm and faithful friendship. On the lips—' her color rose and she drew a long breath—'a kiss on the lips denotes all things. Kiss me, then, once. Express in one kiss your feeling toward me.'

"The bashful youth pondered.

"'I don't want to lose her,' he said to himself. 'Where is it best to kiss her? Hand, forehead or lips?'

"A mellow whistle interrupted him. He looked at the girl. Her red mouth was puckered up in the form of a rosebud; she had pulled down her hat so as to hide her forehead completely, and both hands were thrust up to the wrists in her pockets."

THE LAW AND THE PROFITS.—The late Henry D. Fitzgerald, for many years a United States Commissioner in Buffalo, enjoyed something more than a local reputation as an orator and a wit, both on the stump and in the forum. One of the criminal cases in which he appeared for the defense ran late into a Saturday evening. After his charge to the jury, Manly C. Green, the presiding justice, suggested an adjournment until Sunday morning for the purpose of receiving a verdict, "provided it will not conflict with the probable church engagement of the counsel for the defense." On Mr. Fitzgerald's gracious disclaimer of such an engagement, Judge Green remarked: "The court thought, judging from the counsel's very eloquent *discourse* this afternoon, that nature intended him for the church rather than for the bar." To which Fitzgerald, rising, instantly retorted: "Your Honor, it is true that nature intended me for the church, but my people, finding me too honest, made a lawyer out of me." "And so," continued Judge Green, "you gave up the Law and the Prophets—" "For the law and the profits," interrupted Mr. Fitzgerald, who usually had the last word in a contest of repartee.

AMICI CURIÆ.—"Defend me from my friends; I can defend myself from my enemies," said Maréchal Villars when taking leave of Louis XIV. Apparently of the same mind was the Missouri Supreme Court in the recent case of Wampler *v.* Atchison, etc., R. Co., 269 Mo. 464, wherein Chief Justice Graves said: "We have been flooded with briefs amicus curiæ upon this question. One of these numerous briefs is signed by thirty-six individuals and firms. The line-up would appear to be that counsel representing appellants in cases pending here or in other appellate courts, are urging the view taken by appellant here, whilst counsel representing appellees in cases pending here and in other appellate courts have come to the rescue of appellee in this case. Friends of the court are therefore upon both sides of the question, and the court is required not only to determine the question as between the appellant and appellee in the instant case, but also to reconcile (a thing impossible) the conflicting views of its own friends. The court is left in a sorry plight so far as its friends are concerned. If we count these friends by numbers and upon that decide the case, we would perhaps, from the briefs filed, have to decide the dispute in favor of the appellee in the case at bar. But where our friends are so conflicting in their views as to the duty of the court, the safer plan is to take up the question in issue between appellant and appellee in the instant case, and decide that matter upon the law as we see it, and let the matter go. To our many friends upon both sides we are deeply grateful for suggestions made, in the briefs, and we acknowledge that such have thrown much light upon the question. We only regret that our friends, in real friendly spirit, could not have gotten more nearly together. We did not anticipate that they would, however, when we realize that each set were viewing the question through different colored optics."

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# Law Notes

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### The Open Shop.

THE United States Supreme Court has recently rendered a decision of great importance bearing on the labor problem, its effect being that the attempt to form a labor union may under some circumstances be unlawful. It appeared that certain mine operators employed men only on an agreement that they should not be members of a union. As to the effect of this agreement, the court said:

"Having established this working agreement between it and its employes with the free assent of the latter, the plaintiff is entitled to be protected in the enjoyment of the resulting status as in any other legal right; that the fact that the employment was terminable by either party at any time made no difference, since the right of the employes to strike or to leave the work gave no right to defendants to instigate a strike; that plaintiff was and is entitled to the good-will of its employes, precisely as a merchant is entitled to the good-will of his customers, although they are under no obligation to deal with him; that the value of the relation lies in the reasonable probability that, by properly treating its employes and paying them fair wages and avoiding reasonable grounds of complaint, plaintiff will be able to retain them in its employ and to fill vacancies occurring from time to time by the employment of other men on the same terms, and that defendants could not be permitted to interfere with these rights without some just cause or excuse."

After recognizing the general lawfulness of trades unions, the court quoted the maxim *sic utere,* etc., and continued:

"Hence, assuming that the defendants were exercising the right to invite men to join their union, nevertheless, since they had notice that plaintiff's mine was run nonunion, that none of the men had a right to remain at work there after joining the union, and that the observance of this agreement was of much importance and value both to plaintiff and to its men who had voluntarily made the agreement and desired to continue working under it, the defendants were under a duty to exercise care to refrain from unnecessarily injuring plaintiff, yet they deliberately and advisedly selected that method of enlarging the union membership which would inflict injury upon plaintiff and its loyal employes, by persuading man after man to join the union, and, having done so, to remain at work, keeping the employer in ignorance of their number and identity, until so many should have joined that by stopping work in a body they could coerce the employer and the remaining miners to organize the mines. The conduct of defendants in so doing was unlawful and malicious."

The decision is one which will be far reaching in its consequences. It is apparently the most serious legal blow which trade unionism has ever received.

### The Constitution and Liberty.

A CORRESPONDENT, whose communication is printed in another column, takes exception to the statement in a recent editorial that were every limiting provision in our constitution repealed we would no more lose our liberties than the English and Canadians have done. He points out the difference between the English parliamentary tenure and our own, arguing that a far greater risk is incurred by giving unlimited power to a legislature whose members hold for a fixed term. It may be said in the first place that it is not unusual for an English Parliament to hold for longer than the two years for which our members of Congress are elected. In addition, the executive and the members of the upper house of Parliament take office by inheritance and hold it for life. If the powers of the King and the Lords are limited, it is not by a written constitution but by public sentiment that the limitations are imposed. On the other hand in Germany under the written constitution of 1871 all power has gravitated to the Kaiser and the Bundesrat, and the Reichstag has become a mere debating society. All of which would seem to bear out the assertion that the guaranty of liberty rests not in parchment but in the minds and hearts of the people.

### Refusal of Extradition.

CONSIDERABLE comment has been excited by the recent refusal of Gov. McCall of Massachusetts to honor a requisition from West Virginia for a negro charged with rape, the expressed ground of the refusal being that the accused would not be given a fair and legal trial in West Virginia. The general sentiments expressed by the governor with respect to the evils of race prejudice and the need for more impartial administration of justice will meet with general acceptance. But behind these lies the cold legal fact that this action, designed as a protest against lynch law, is itself equally without warrant in the law. The Constitution of the United States (Art. IV, Sec. 2) provides in no uncertain terms that a fugitive from justice "shall" on demand of the executive authority of the state from which he fled be delivered up. The right of the demanding state under that provision is founded on the Constitution as the supreme law of the land and not on

comity. *People v. Hyatt,* 172 N. Y. 176; *Ex parte Morgan,* 20 Fed. 298. "The right given to 'demand' implies that it is an absolute right and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged or to the policy or laws of the state to which the fugitive has fled." Chief Justice Taney in *Kentucky* v. *Dennison,* 65 U. S. 66.

It is of course true that the duty is one for whose enforcement no means is provided. "The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793. And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union." *Kentucky* v. *Dennison,* supra. But as was said in *Ex Parte Swearingen,* 13 S. Car. 74, "The very fact that there is no mode of enforcing the performance of the duty imposed upon the governor of the state upon which the demand is made, by mandamus or otherwise (*Kentucky* v. *Dennison,* supra), makes it all the more obligatory that he should be scrupulously exact and prompt in the performance of such duty." In *Marbles* v. *Creecy,* 215 U. S. 63, Mr. Justice Harlan said: "It is clear that the executive authority of a state in which an alleged fugitive may be found, and for whose arrest a demand is made in conformity with the Constitution and laws of the United States, need not be controlled in the discharge of his duty by considerations of race or color, nor by a mere suggestion—certainly not one unsupported by proof, as was the case here—that the alleged fugitive will not be fairly and justly dealt with in the state to which it is sought to remove him nor be adequately protected, while in the custody of such state, against the action of lawless and bad men."

#### The War Power of the States.

THE war power is of course vested primarily in the general government to which alone is given the power to make war. But as certain powers are by the Constitution committed exclusively to the states it is plain that these may be affected by the existence of war. This is illustrated in two recent cases, both involving the regulation of the sale of intoxicants. In reversing a holding against the validity of a statute forbidding the sale of liquor in close proximity to military camps, arsenals, etc., the appellate division of the New York Supreme Court said:

"This legislation now attacked is an emergency measure for the safety and efficiency of the enlisted men while in training and those engaged in munition and equipment, services equally important. It is demanded by the 'high behests of war,' which may call the people to every sacrifice. Accustomed, as we have become, to the war powers of the Federal Government, we are not to overlook the unquestionable war powers of the State. While the State cannot declare war, or in itself carry it on, it is bound to render loyal aid to the general Government in the effective prosecution of the war. After raising the military and industrial personnel, it is still under a duty to safeguard them from evil influences, even when its citizens have been mustered into the Federal military service. The State has also in good faith to cooperate in the national policies for war efficiency."

In *Cook* v. *Burnquist,* 242 Fed. 321, the court sustained an order of the Minnesota Public Safety Commission, a body created by a state statute and authorized "in the event of war . . . to do all acts and things not inconsistent with the constitution or laws of the state of Minnesota or of the United States which are necessary or proper for the public safety . . . so that the military, civil and industrial resources of the State may be most efficiently applied toward the defense of the State and nation and toward the successful prosecution of such war." The order in question required the closing of all saloons at 10 o'clock p.m., an hour earlier than the closing time fixed by statute. Judge Booth said: "The words 'not inconsistent with the . . . laws of the state of Minnesota,' contained in section 3, should not be given a narrow construction, in view of the broad purposes of the act and the great emergency it was intended to meet. The words above quoted should rather be held to mean not inconsistent with the broad purposes, the underlying principles, and the fundamental requirements of the laws of Minnesota. With such a construction placed upon section 3, the Order No. 7 is well within the purview of the act."

The doctrine deducible from the foregoing case is one of peculiar importance. If it finds general acceptance it will make possible legislation sorely needed for protection from enemies in our midst, without granting at the same time powers unnecessary and perhaps dangerous in time of peace.

#### The Duty of the Foreign Born.

MUCH has been said and written with reference to the duty of the foreign born in time of war. No finer formulation of that duty could be made than that given by Chief Justice Andrew Bruce of the North Dakota Supreme Court, who, in addressing the American Bar Association, said:

"I speak from the viewpoint of the foreign born. I, and millions of others like me, came to this country alone, without money and without friends. We sponged on all that America had, her free lands, her free schools and above all her spirit of open hearted comradeship. She owed us nothing but she gave us all. We swore allegiance to her flag, her Constitution and her laws. We would be recreants, ingrates, perjurers and curs, if in the hour of her need we counselled with her enemies and were disloyal to her cause."

Not the least of the benefits which we may hope to gain from the war is that those of our citizens who will not rise to this level of patriotism will at its close be marked men who can hope for neither public preferment nor private respect.

#### Enlistment of Minors.

FROM the fact that the question is still being brought before the courts there seems to be some difference of opinion in the profession as to the right of a minor under eighteen who has enlisted in the army without his

parent's consent to procure his discharge. The statute (Act June 3, 1916, c. 134, § 27, Fed. St. Ann. Pamph. Supp. No. 7, p. 63) prohibits the mustering into the service of any person under eighteen without parental consent. An enlistment without that consent is invalid as to the parents and the enlisted man cannot be held thereunder as against their demand for his release. See the note to *Dillingham* v. *Booker,* 16 Ann. Cas. 129. But the minor himself is not entitled to avoid the enlistment. He is not only de facto but de jure a soldier. *In re Morrissey,* 137 U. S. 157. And if he has committed any breach of military law he may be held and punished therefor, as against the claim of his parents. This was at one time doubted. (*In re Baker,* 23 Fed. 30; *U. S.* v. *Wright,* 5 Phila. 296.) It is, however, now settled beyond controversy. *In re Miller,* 114 Fed. 838, 52 C. C. A. 472; *U. S.* v. *Reeves,* 126 Fed. 127, 60 C. C. A. 673; *In re Scott,* 144 Fed. 79, 75 C. C. A. 237; *Dillingham* v. *Booker,* supra; *Hoskins* v. *Dickerson,* (C. C. A.) 239 Fed. 275, Ann. Cas. 1917C 776; *Ex parte Willeford,* (C. C. A.) 220 Fed. 291. Among the cases decided since the present war is *Ex parte Dostal,* 243 Fed. 664, wherein the subject was examined at length. In a yet more recent case, *In re Rush,* not yet reported, the same rule was laid down by Judge Clayton. As was said by Judge Goff in *Dillingham* v. *Booker,* supra, "To hold otherwise would make enlistment a farce, would destroy discipline and offer a premium for desertion." The right of a parent to secure the release of a son who has enlisted without his consent is lost if it is not asserted promptly. *Ex parte Dostal,* supra; *In re Rush,* supra, and cases cited.

#### A Moratorium for Men in the Service.

IT has been referred to frequently as a cause for congratulation that in our military preparation for participation in the war we are able to take advantage of the dearly bought experience of our allies. We should in like manner profit from the legal measures for domestic administration which have been found necessary elsewhere. We have at this writing been at war for over eight months; we have called more than a million men to the colors and have sent many of them over seas. A large number of them were with but little warning taken by conscription from their vocations, yet we have as yet made little effort to protect their property rights in their absence. A moratorium act has been passed in Maryland, and similar legislation is reported as pending in other states, but both uniformity and expedition demand a federal enactment.

The nature of the provision which should be made is, however, a matter for serious consideration. The German act of Aug. 4, 1914, and the French act of Aug. 5, 1914, prohibit absolutely all proceedings against persons in the active service until the close of hostilities. The English act of Aug. 3, 1914, extended beyond persons in the service and was designed primarily to guard against financial panic. Such legislation is, of course, unnecessary in the United States at the present time. But, as limited to persons actually serving with the colors, there is much to be said in favor of the policy of the English act as modified by the emergency legislation of Aug. 31, 1914, which instead of making the prohibition absolute in all cases commits each particular case to the discretion of a judge of a court of record. Such a discretion wisely and patriotically exercised would meet the necessities of every occasion and avoid unnecessary hardship to either the debtor or the creditor class.

#### Review of Findings of Conscription Boards.

UNDER the Civil War conscription acts a judicial power of review as to the liability to conscription was asserted. *Stingle's Case,* 23 Fed. Cas. No. 13,458; *Ex parte Coin,* 38 Ala. 440; *In re Bryan,* 60 N. Car. 1; *In re Spangler,* 11 Mich. 298. It was hoped by all persons interested in the prompt and vigorous prosecution of the war that this feature might be avoided by the Act of 1917, and from the one decision so far made such a result has been attained. In *U. S.* v. *Heyburn,* 245 Fed. 360, it was held that the finding of the drafting board as to liability to service would not be reviewed on habeas corpus. Judge Dickinson said: "This country has been found and adjudged to be in a state of war. The national defense is an absolute necessity of our existence. The people of the United States have prepared themselves for such a situation by confiding to Congress the power to declare war and to support and maintain armies for the national defense. This is necessarily a master power, to be exercised without the hampering interference of any one. The call of men to the colors is within, and necessarily within, the exercise of this power. To whom the call goes out, and who is to make an answering response, are matters germane to, and indeed necessarily involved in, the exercise of the war-making power. Questions which necessarily arise, or may be expected to arise, must be determined in some way and by some tribunal. The war-making power may therefore provide the required system and constitute the needed tribunals. It is not only lawful, but fitting, that they should be military tribunals. Congress has constituted such tribunals for the war in which our people are now engaged. The lawful and independent jurisdiction which belongs to other tribunals belongs to them. To this jurisdiction all must submit, and all who are well disposed to our country will willingly submit. Upon whom of those within the prescribed age limits, who have registered, the duty of military service has been imposed, because of their being citizens or denizens who have declared their intention to become citizens; who are to be excluded from the privilege of service, because alien enemies; who are exempt from service, because of the existence of any of the prescribed reasons for exemption; who are ill fitted for the performance of military service; and who have responsibilities and duties elsewhere so imperative and urgent as to prevent active military service—are all matters of which these tribunals have jurisdiction. They, indeed, constitute in an emphatic sense the subject-matter of that jurisdiction. . . . All the facts we are here asked to find either have been or may be determined by other tribunals established by law for this purpose. If they have not been asked to determine them, the relators should be referred to those tribunals. If they have been decided, we see no occasion under the averments of these petitions to exercise an appellate duty which has not been imposed upon the court." A like rule, it may be noted, obtains in England, *King* v. *Commanding Officer,* [1917] 1 K. B. 176, Ann. Cas. 1917C 809.

### Gospel and Law.

EVERY reform suffers more from its extreme advocates than from its enemies. Everyone agrees that our soldiers should be protected from the vicious elements which are always attracted to any place where a large number of men are segregated. But an occasional outburst of the "unco good" tends strongly to disgust a normal man with the whole subject. A clergyman living on Long Island is reported as having recently said, in reference to reports that liquor was served to officers and soldiers invited to dinner on Thanksgiving day in private homes:

"Let me say that if I come across any instance of any one giving a soldier or seaman liquor, or if any one reliably informs me of any such action on the part of anybody here in Flushing, however high in the social scale he or she may be or to whatever church he or she may belong, my own or any other, I shall make every effort in my power to secure the arrest and conviction of the guilty party.

"It is bad enough for a bartender to sell a soldier or a seaman a drink, but for so-called respectable people to invite to their homes men away from home, lonely and homesick, and so especially open to temptation, and put intoxicating drinks before them is outrageous."

Fortunately the reverend gentleman is mistaken as to the law. The provisions of the statute are as follows:

"That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to officers and enlisted men of the army as he may from time to time deem necessary or advisable; Provided, That no person, corporation, partnership or association shall sell, supply or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this act, but the Secretary of War may make regulations permitting the sale and use of intoxicants for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale or wine, to any officer or member of the military forces while in uniform, except as herein provided."

A person who as agent or messenger of an enlisted man procures liquor for him may be liable, though the weight of authority seems to be otherwise. *State* v. *Ito,* Ann. Cas. 1912C and note. But there is nothing in the law to prevent a person who entertains a soldier as a guest in his home from offering liquor to him.

### A Lay Remedy.

FROM a recent issue of an Ohio newspaper we clip the following editorial comment:

"In a court in Illinois a lawsuit was ruled out because the pleadings did not present the merits of the case. Well, then, there should be a law making it the sworn duty of the judge to scratch out lines and insert others, so that the merits of the case may be brought forth. This may not seem to be altogether professional, but we hold it to be plain common sense. The case referred to entered upon a long course of delays, and every delay was an obstacle to justice. If the judge doesn't care to interfere, he should direct the lawyers to make an issue within an hour or suffer a default."

If the primary function of the courts was to expedite business the idea would be admirable. But how about the unfortunate defendant? He is brought into court to answer a particular claim stated in the plaintiff's complaint. On that issue his attorney has looked up the law, examined the witnesses and procured their attendance. Then the judge benevolently inserts a few lines making quite another claim against him and it is said to be a shameful and shocking delay of procedure if he is allowed time to investigate the evidence as to that. The critic apparently writes in blissful ignorance of the rule now generally established by the courts, which is that a substantial amendment of the pleadings at the trial is not ground for a continuance unless the opposite party "affirmatively shows not only that he is surprised by such amendment but that by reason thereof he is not prepared to go to trial on the issues as finally made." See *Pollock* v. *Jordan,* Ann. Cas. 1914A 1264 and note. Further than this it certainly is not possible to go without absolute injustice to litigants. But as long as our journalists blandly point out the faults of technique in the singing of Caruso and the base running of Cobb, what can the legal profession expect?

### Another Remedy.

IT is reported in the press that a Chicago judge has, to clear up his docket, adopted the expedient of trying two cases simultaneously in adjoining court rooms. The report is, however, probably a canard, since it describes the trial of two cases of felony, and it is settled beyond question that even a momentary absence of the judge from the court room during such a trial without suspending the proceeding is fatal. *Graves* v. *People,* 2 Ann. Cas. 6, *Skaggs* v. *State,* 16 Ann. Cas. 622, and notes. The same rule has been announced in several civil cases. *Heberly* v. *Howcutt,* 6 Colo. 574; *Britton* v. *Fox,* 39 Ind. 369; *Baltimore, etc., R. Co.* v. *Polly,* 14 Gratt. (Va.) 447; *Smith* v. *Sherwood,* 95 Wis. 558. So it seems likely that this device, which apparently combined the saving of the public money with the excitement of a three ring circus, is but "stage law" after all. Another promising expedient, the use of the jury engaged in one case for the trial of another during an adjournment, has also met with judicial condemnation. *Anderson* v. *Caruthers,* Ann. Cas. 1913E 753, wherein the court said: "Trained judges may carry in their minds successfully two cases simultaneously, but it is unfair to impose such a burden on a jury." There is, however, authority to the contrary. *Haines* v. *Thompson,* 129 Ill. App. 436; *Bennett* v. *Com.,* 106 Va. 834.

### Finger Print Evidence.

UNDER the above caption a recent article in LAW NOTES (February, 1917) reviewed the decisions at some length. A valuable contribution to the literature of the subject has, however, been since made in the case of *People* v. *Sallow,* 100 Misc. 447, 165 N. Y. S. 915, wherein the validity of an act requiring the taking of the finger prints of persons arrested for crime to determine whether they had been previously convicted was sustained in an exhaustive opinion. The origin of the use of finger prints was interestingly stated by Judge Wadhams, who said: "Before examining the authorities which by analogy are pertinent, the origin and nature of finger prints will be considered. Scientific authority declares that finger prints are reliable as a means of identification.

10 Ency. Brit. (11th ed.) 376. The first recorded finger prints were used as a manual seal, to give a personal mark of authenticity to documents. Such prints are found in the Assyrian clay tablets in the British Museum. Finger prints were first used to record the identity of individuals officially by Sir William Herschel, in Bengal, to check forgeries by natives in India in 1858. C. Ainsworth Mitchell, in 'Science and the Criminal,' 1911, p. 51. Finger print records have been constantly used as a basis of information for the courts since Sir Francis Galton proved that the papillary ridges which cover the inner surface of the hands and the soles of the feet form patterns, the main details of which remain the same from the sixth month of the embryonic period until decomposition sets in after death, and Sir Edward Henry, the head of the Metropolitan Police Force of London, formulated a practical system of classification, subsequently simplified by an Argentine named Vucetich. The system has been in general use in the criminal courts in England since 1891. It is claimed that by means of finger prints the Metropolitan Police Force of London during the 13 years from 1901 to 1914 have made over 103,000 identifications, and the Magistrates' Court of New York City during the 4 years from 1911 to 1915 have made 31,000 identifications, without error. Report of Alfred H. Hart, Supervisor, Fingerprint Bureau, Ann. Rep. N. Y. City Magistrates' Courts, 1915. Their value has been recognized by banks and other corporations, passport bureaus of foreign governments, and civil service commissions as a certain protection against impersonations."

## THE LAW OF TREASON.

PROSECUTIONS for treason have been few for many years and the very name has lain dormant for half a century or more until resurrected by recent events. As the crime is the highest known to the law and always tends powerfully to excite and agitate the popular mind, the framers of the Constitution deemed it safest to define and limit the offense in the fundamental document itself (Art. III, Sec. 3):

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

The terms here used were borrowed mainly from the famous statute passed in the reign of Edward III (1352) on account of the multitude of treasons that had arisen by arbitrary judicial construction at the instigation of the crown under the ancient common law. The language of the statute was weighed, interpreted and glossed by successive generations of English judges and commentators and the meaning well settled at the time the Constitution was adopted.

The question of what constitutes "levying war" against the United States came up in the Supreme Court for the first time on a motion for writs of certiorari to review the proceedings of the Circuit Court in *Ex parte* Bollman and Swartwout (1807, 2 Curtis [U. S.] 23), emissaries of Aaron Burr in his alleged treasonable plans. Speaking through Chief Justice Marshall the court held that to complete the crime of levying war there must be an actual assemblage of men for the purpose of effecting by force a treasonable design, but that all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. In the case before the court, a design to overturn the federal government in New Orleans by force would unquestionably have been a design which, if carried into execution, would have amounted to treason, but no mere consultation or conspiracy for this object, no enlisting of men uncombined with an attempt to effect it, would be an act of levying war. Some actual force or violence must be used in pursuance of the design, though the quantum of force is immaterial. There need not be military array or weapons; numbers alone may supply the requisite force. These principles were shortly afterwards discussed at large and reaffirmed by the Chief Justice sitting on circuit in the trial of Aaron Burr (25 Fed. Cas. No. 14,693), and his language has become crystallized in the general law on this branch of the subject.

But levying war is not only war for the purpose of entirely overthrowing the government. It includes as well an assembling of men acting in forcible opposition to any law of the United States pursuant to a common design to prevent the execution of that law in all cases or any case within their reach, under any pretense of its being unequal, burdensome, oppressive, or unconstitutional (*Case of Fries,* 9 Fed. Cas. No. 5,127). It is not enough if the intention be merely to defeat the operation of the law in a particular instance, or through the agency of a particular officer, for some private or personal motive; the object of the resistance must be of a public and general character (*U. S.* v. *Hoxie,* 26 Fed. Cas. No. 15,407). On the other hand, if the object be to prevent the execution of one or more of the laws of a particular state, but without any intention to intermeddle with the relations of that state with the national government or to displace the national laws or sovereignty therein, that is treason against the state only (Story, J., Charge, 30 Fed. Cas. No. 18,275; *People* v. *Lynch,* 11 John. N. Y. 549).

What constitutes an "overt act" under the second branch of the definition, namely, giving aid and comfort (adhering) to the enemy, is more difficult. The question will necessarily depend very much upon the facts and circumstances of each particular case, but obviously the act must always be of a character susceptible of clear proof and not resting in mere inference, conjecture or suspicion. In general, it has been held that when war exists any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which by fair construction is directly in furtherance of their hostile designs, renders them aid and comfort; or if this be the natural consequence of the act, if successful, it is treasonable in its character (Leavitt, J., Charge, 30 Fed. Cas. No. 18,272). Every act which in regard to a domestic rebellion would make the party guilty of levying war would in regard to a foreign power with which the United States is at war constitute "adhering to their enemies" (*U. S.* v. *Greathouse,* 26 Fed. Cas. No. 15,254).

Some acts leave little or no room for doubt, such as the communication of intelligence to the enemy by letter,

telegraph or otherwise, relating to the strength, movements or position of the army; furnishing arms, troops, munitions, etc., and sending money and provisions, or obtaining credits, all with intent to aid the enemy in his acts of hostility (Nelson, J., Charge, 30 Fed. Cas. No. 18,271). The destruction of munitions and supplies designed for the army in the field would seem unquestionably to belong to the same category, for the aid is none the less effectual that it is indirect. War is necessarily a trial of strength between the belligerents and whatever weakens one gives corresponding advantage to the other. It makes no difference whether or not the enterprise commenced shall be successful and actually render assistance. The bare sending of intelligence, for example, which is usually the most valuable aid that can be given, will make a man a traitor even though the intelligence should happen to be intercepted; for the party in sending it did all he could; the treason was complete on his part though it had not the effect he intended (*U. S.* v. *Greathouse,* supra).

Mere expressions of opinion, however, indicative of sympathy with the public enemy will not in themselves constitute an overt act, although when uttered in relation to an act which, if committed with a treasonable design, might amount to such overt act, they are admissible as evidence tending to characterize it and to show the intent with which the act was committed; and they may also furnish some evidence of the act itself against the accused. But this is the extent to which such publications or utterances may be used either in finding a bill of indictment or on the trial of it (Nelson, J., supra). So also felonious attempts being essential, it is competent to show that some time before the event facts had occurred and rumors were prevalent in the neighborhood which would explain certain particulars relied on to show a treasonable intent and make the accused show a different one (*U. S.* v. *Hanway,* 26 Fed. Cas. No. 15,299).

In treason there are no accessories. All persons who counsel and incite others to subvert the government or resist the law by force, or to give aid and comfort to the enemy, are in contemplation of law principals, although they may not themselves directly participate or be actually present at the immediate scene of violence; for successfully to instigate treason is to commit it (*Ex parte* Bollman and *Case of Fries,* supra). No plea of compulsion will excuse a treasonable act unless it were done under an immediate and well-founded fear of death or grievous bodily harm. Mere apprehension of any loss of property, or of slight or remote injury to the person, is not enough (*U. S.* v. *Vigol,* 28 Fed. Cas. No. 16,621).

In legislating on the subject Congress has provided that "Whoever, owing allegiance to the United States, levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason," punishable by death or, at the discretion of the court, by imprisonment for not less than five years coupled with a fine of not less than ten thousand dollars and incapacity to hold any office under the United States (Fed. Crim. Code, secs. 1 & 2). The words "owing allegiance to the United States" are here entirely surplusage and do not in the slightest degree affect the sense of the section (*U. S.* v. *Wiltberger,* 4 Curtis [U. S.] 574), for treason is a breach of allegiance and it is well settled that every resident or sojourner within the United States, as well as every citizen, owes to the government a local allegiance, permanent or temporary, sufficient to subject him to the penalties of treason (*Carlisle* v. *U. S.,* 83 U. S. 154). Protectio trahit subjectionem et subjectio protectionem.

In conclusion, it should be noted that Congress has also defined and penalized misprision of treason, or the bare knowledge and concealment of treason in others, without any degree of assent thereto (Code, sec. 3), thus accentuating the plain duty of everyone to expose treason and bring traitors to justice.

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## HAS THE FEDERAL CRIMINAL CODE BEEN REPEALED?

THE Act of Congress of March 4, 1909, commonly termed the "Criminal Code"—sometimes "Penal Laws"—was a codification of the federal criminal laws and consisted of 345 sections. Section 198 defined the offense of wilfully injuring letter boxes or mail matter therein and prescribed the punishment therefor. Section 10 of the Act of May 18, 1916, "to amend the act approved June twenty-fifth, nineteen hundred and ten, authorizing the postal savings system, and for other purposes," consisted of this provision: "That the Act of March fourth, nineteen hundred and nine (Thirty-fifth Statutes, page eleven hundred and twenty-six) be amended to read as follows:"—the amendatory enactment being an evident substitute for sec. 198 above cited. In an appropriation act of July 28, 1916, a paragraph directed that sec. 10 of the Act of May 18, above quoted, "be amended by inserting after the first word of said section, 'That,' the words 'section one hundred and ninety-eight of the.'" The foregoing facts are set forth in an editorial paragraph in the *Docket* for November, and then the following queries are there propounded: first, whether the amendment of May 18, 1916, did not operate to repeal the entire Criminal Code, and, secondly, whether if such repeal was thus effected, the Code was restored by the amendment of July 28, 1916. Although the *Docket* says the situation "may raise hopes in the hearts of those who have fallen into the clutches of Uncle Sam and are grasping at any straw for defense," it is impossible to suppose that our esteemed contemporary offers its queries seriously; for it quotes sec. 10 of the Act of May 18, 1916, without the parenthetical words pointing out the exact page (1126) of the Statutes at Large, which happens to be the page on which section 198 appears and thereby leaves hardly so much as a straw for controversy.

But "grasping at any straw" is a pastime in which most good lawyers indulge on occasions. The classical Trial of the Seven Bishops, as reported in Howell's State Trials, shows some very high-class pettifogging by eminent lawyers in the long debate before the information was read to the defendants. Coming down to costermonger days, in *Central Trust Co.* v. *Lueders,* 239 U. S. 11, 36 S. Ct. 1, 60 U. S. (L. ed.) 119, quoted in 4 Fed. Stat. Annot. (2d ed.) at pp. 833, 834, there was an attempt to ascend into the Supreme Court by means as slender as a straw. Congress now and then commits blunders, as all lawyers and judges know, and might conceivably amend

a provision designated as the "Revised Statutes," instead of a named section thereof,—whereupon some one would query whether the entire Revision were not repealed. The first impulse of the mind would be to reject the contention, and in this article it will be shown that such impulse would be abundantly supported by legal reasoning and authority.

First let it be assumed that the words in parentheses above quoted in the Act of May 18 were omitted. The primary insistence of counsel defending a man prosecuted for a violation of the Criminal Code would then be that, in the language of Mr. Justice Lamar, "Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction" (*Lake County* v. *Rollins,* 130 U. S. 662, 670, 9 S. Ct. 651, 32 U. S. (L. ed.) 1060), and that, as Mr. Justice Brown said, "the province of construction lies wholly within the domain of ambiguity" (*Hamilton* v. *Rathbone,* 175 U. S. 414, 421, 20 S. Ct. 155, 44 U. S. (L. ed.) 219). Congress expressly amended "the Act"; these words are not ambiguous, it would be urged; and it is well settled that an amendatory act complete in itself operates to repeal by implication that which is amended. *Norris* v. *Crocker,* 13 How. 429, 14 U. S. (L. ed.) 210; *U. S.* v. *Bare,* 4 Sawy. 254, 24 Fed. Cas. No. 14,527). It is likewise unquestionable that "there can be no legal conviction nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence" (*U. S.* v. *Tynen,* 11 Wall. 88, 95, 20 U. S. (L. ed.) 153, 155), or "unless there be either a clause in the repealing statute or provision of some other statute expressly authorizing such prosecution." *U. S.* v. *Reisinger,* 128 U. S. 398, 9 S. Ct. 99, 32 U. S. (L. ed.) 480. Such authority exists, however, as to violations of a statute prior to its repeal—violation of the Criminal Code, for instance, prior to its assumed repeal—by force of sec. 13 of the Revised Statutes, which was a re-enactment of an Act of 1871, the latter having been passed immediately after the decision in *U. S.* v. *Tynen,* above cited.

The reply would be that "the sole object to be sought in the interpretation of a law is the intention of the legislative body which enacted it, and rules of construction are only serviceable as they assist us to attain that object" (*In re Clerkship, etc.,* 90 Fed. 248, 251); that "in the construction of statutes one part must be construed by another" (*U. S.* v. *Freeman,* 3 How. 565, 11 U. S. (L. ed.) 728), and "every part of an act is to be taken into view for the purpose of discovering the mind of the legislature, and the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act" (*Pennington* v. *Coxe,* 2 Cranch 33, 52, 2 U. S. (L. ed.) 199, per Chief Justice Marshall); that, applying the rule last above stated, an ambiguity is perceived in the Act of May 18, and if "the text is ambiguous . . . then the cardinal rule requiring that we look beneath the text for the purpose of ascertaining and enforcing the intent of the lawmaker would govern." *George M. West Co.* v. *Lea,* 174 U. S. 590, 595, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098. The ambiguity arises from the fact that the title of the act alleged to be repealed—the Criminal Code of 1909—is "An act to codify, revise, and amend the penal laws of the United States," and contains 345 sections, while the section in the Act of May 18 purports to "amend" that "Act" of 1909, and if really an amendment, without qualification, of the entire act, it would continue to be a codification or revision; a provision entirely departing from the character assumed in the title of the original act and relating to a single section of 345 would not be purposely termed, without qualification, an *amendment* of the act. Thus in *U. S.* v. *Hogg,* 112 Fed. 909, 912, 50 C. C. A. 608, where the court was construing a provision in a state "Revised Statutes" compilation, Judge Lurton said: "We should also bear in mind that the purpose of a revision is to revise," etc. Since the Act of May 18 does not "amend" the entire Criminal Code in the usual sense of that word, it presents an ambiguity authorizing a court to "look beneath the text." Furthermore, "in construing an act of Congress if there be a plain mistake apparent upon the face of the act, which may be corrected by other language in the act itself, the mistake is not fatal." Per Mr. Justice Story in *Blanchard* v. *Sprague,* 3 Sumn. 279, 282, 3 Fed. Cas. No. 1517.

Resorting to its judicial knowledge, the court is aware that the formula employed by Congress when dealing with part of a code was well illustrated when sections 274*a,* 274*b* and 274*c* were added to the Judicial Code by the Act of March 3, 1915; the enacting clause of this act provided "That the Act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven, be, and the same is hereby, amended *by inserting after section two hundred and seventy-four thereof three new sections,*" etc. The court thus guided in its inquiry, further research "beneath the text" of the Act of May 18 readily reveals the fact that section 198 of the Criminal Code is the provision, and the only one, that is really amended.

The court also judicially knows that Congress, sometimes carelessly and at other times ignorantly, is apt to be inexact in its use of terms in legislation. Thus, section 3 of the Bankruptcy Act of 1898 is divided into several paragraphs, denominated as *a, b, c, d,* and *e.* Paragraph *a* is divided into five different headings, designated numerically from 1 to 5. Paragraph *c* reads: "It shall be a complete defense to any proceedings instituted *under the first subdivision of this section* to allege and prove that," etc. In *George M. West Co.* v. *Lea,* 174 U. S. 590, 19 S. Ct. 836, 43 U. S. (L. ed.) 1098, the Supreme Court, upon consideration of the entire section 3, held that even if the words above italicized, considered intrinsically, imported a reference to paragraph *a* as an entirety, "the context makes it plain that the words relied on were only intended to relate to the first numerical subdivision of paragraph *a,*" and proceeded to show that unless this conclusion were adopted "it would be impossible to construe the statute harmoniously without eliminating some of its provisions."

"Congress must be presumed by the courts to be acquainted with the existing law in respect to subjects upon which it legislates." Per Woods, J., in *Columbia Wire Co.* v. *Boyce,* 104 Fed. 172, 174, 44 C. C. A. 588. This is a pleasant and necessary fiction, but often overcome by fact. For example, Judicial Code, sec. 246, was amended by the Act of Jan. 28, 1915, to read as follows:

"Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within the same time, in the same manner, under the same regulations and in the same classes of cases, in which writs of error *and appeals* from the final judgments and decrees of the highest court of a state in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven," etc.

Now, under section 237, thus adopted by reference, a final judgment or decree of the highest state court was reviewable by the federal Supreme Court only on a writ of error, not by appeal; and never since the foundation of the government has an *appeal* been allowed in such a case. Not only was that fact evidently unknown to the political lawyer or the Judiciary or other committee who drafted or reported the amendment, but it is almost equally certain that they were not cognizant of the important amendment of sec. 237 made by the Act of Dec. 23, 1914, shown in 5 Fed. Stat. Ann. (2d ed.) at p. 723. By the way, the same sec. 237 was again amended by Act of Sept. 6, 1916, as stated in the note in Fed. Stat. Ann., at the place just cited, and it is a nice question whether the amendment of sec. 246, above quoted, shall ambulate with such amendment of sec. 237. See on that point *In re Heath,* 144 U. S. 92, 12 S. Ct. 615, 36 U. S. (L. ed.) 358, quoted at much length in 5 Fed. Stat. Annot. (2d ed.) at pp. 902, 903.

Judicial Code, sec. 207, prescribing the jurisdiction of the Commerce Court, transferred to District Courts in 1913, confers jurisdiction of certain mandamus proceedings "under the provisions of . . . section twenty-three of the Act" of Feb. 4, 1887. But this section 23 was a mere appropriation of money for the use and purposes of the Act for the fiscal year; the marginal reference in the Statutes at Large for that paragraph of the Judicial Code, sec. 207 (36 Stat. L. 1149), indicates that the intended reference was to section 10 of the Act of March 2, 1889, ch. 382. There is little doubt that the professional lawmakers who personally drafted the Judicial Code section containing that error, and suffered it to be enacted, and the other professionals who passed it along in 1913 without discovering the error, would severely "roast" any officer of the army or navy who failed to detect latent defects in munitions not made by himself but by thousands of factory workers!

The district attorney in the prosecution above supposed then announces his purpose to show that "the literal import of the statute . . . is an absurdity so palpable that it cannot be ascribed to the legislative intent" (*Converse* v. *U. S.,* 26 Ct. Cl. 10). Whereupon, defendant's counsel interrupts by quoting from *Harless* v. *U. S.,* 88 Fed. 97, 102, 3 C. C. A. 397, to the point that the court is "not justified in refusing to follow the plain meaning of the statute by reason of the apparently absurd result caused thereby."

However, in *Lau Ow Bew* v. *U. S.,* 144 U. S. 47, 12 S. Ct. 517, 36 U. S. (L. ed.) 340, the court said: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd result." This statement was quoted in *Badaracco* v. *Cerf,* 53 Fed. 169, 3 C. C. A. 491, where counsel unsuccessfully contended for a construction of a federal statute from which it would ensue that the judgments of the Supreme Courts of territories could be appealed to the Circuit Court of Appeals in all cases wherein the amount in controversy did not exceed $1000, but in all cases wherein the amount in controversy exceeded that sum no appeal could be taken, and Shiras, J., said. "The absurdity of the result is the strongest possible argument against the correctness of such a construction." In *U. S.* v. *Hogg,* 112 U. S. 909, 912, 50 C. C. A. 608, Judge Lurton said: "A most unreasonable and absurd purpose . . . should not be regarded as within the legislative intention, if any more reasonable view can be taken." In *In re Hohorst,* 150 U. S. 653, 14 S. Ct. 221, 37 U. S. (L. ed.) 1211, counsel argued for a construction of a section in the Revised Statutes whereby no court, national or state, would have jurisdiction of patent suits involving a less amount than $2000. "It is impossible to adopt a construction which necessarily leads to such a result," said the court. And in *Holy Trinity Church* v. *U. S.,* 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226, a well-known leading case, the court said: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words, make it unreasonable to believe that the legislators intended to include the particular case."

The prosecutor then points out that section 341 of the Criminal Code repeals several hundred sections of the Revised Statutes creating criminal offenses; that section 12 of the Revised Statutes provides that "wherever an act is repealed which repealed a former act, such former act shall not be revived unless it shall be expressly so provided," thus abolishing the common-law rule; that said section 12 not only prevents an express repeal but also an implied repeal of a repealing statute from operating to revive the original act (18 Op. Atty.-Gen. 252 [Garland]); consequently, that none of the repealed Revised Statutes sections is revived if the act of May 18 impliedly repeals the Criminal Code; and, since "it is well settled that there are no common law offenses against the United States" (*U. S.* v. *Eaton,* 144 U. S. 677, 687, 12 S. Ct. 764, 36 U. S. (L. ed.) 591, 594 and cases cited), such implied repeal *leaves the country without any federal criminal law except a few provisions not embraced in the Criminal Code.*

Finally, "we cannot adopt a theory of construction which substantially asserts that the half is equal to the whole" (*Glover* v. *U. S.,* 164 U. S. 294, 298, 17 S. Ct. 95, 41 U. S. (L. ed.) 440. And in *In re Clerkship, etc.,* 90 Fed. 248, Sanborn, J., rejected a proposed construction of a federal statute, which, he said, would make it " 'as idle as a painted ship upon a painted ocean' " (quoting The Ancient Mariner); for, he continued, "that was

not the intention of Congress when it enacted this law." Equally futile would be the Act of May 18 construed as a repeal of the Criminal Code and an amendment and re-enactment of section 198; for an offender against this new enactment could not be punished against the will of himself and his friends after repeal, for instance, of sec. 141 of the Criminal Code punishing rescue of a prisoner or sec. 273 punishing murder—repeal of this last section leaving unprotected the lives of judges and other officials in a United States court room. The Act of May 18 thus construed would be *self-destructive,* a consideration infinitely more potent than that which sufficed to satisfy the Supreme Court in *George M. West Co.* v. *Lea,* above cited, that Congress did not mean exactly what it said.

Where is the provision in the federal Constitution which would authorize Congress to abolish substantially all of the criminal laws of the United States? Certainly not in Art. 1, sec. 8, granting to Congress the power to "provide for the common defense and general welfare of the United States." The existence of "one Supreme Court" is guaranteed by the fact of its creation in Art. III, sec. 1. This does not consist with a power in Congress to deprive the judges of the protection of their lives while holding court in a federal building.

CHARLES C. MOORE.

## HUSBAND'S LIABILITY FOR HIS WIFE'S TORTS

IT would seem to be reasonably clear that our law recognised a right in the husband to inflict corporal punishment on his wife. Such a statement at the present day is calculated to raise protest. It may shock the reader to learn that it was so late as the reign of Charles II. that this right first seems to have been doubted. Whether the right, if it can be called a right, was derived originally from Anglo-Saxon law or from a Norman source we do not pretend to know. But it existed, as witness the statement attributed to Sir Matthew Hale in Lord Leigh's case (1672, 3 Keb. 433), where his Lordship is reported to have said that the *salva moderata castigatione* in the register was not meant to refer to beating, but to admonition and confinement to the house. In that case the parties were reconciled, according to the report, and, as the report puts it, all discharged. This was a happy ending, but it leaves the point of law in doubt whether the court would recognize in the husband a right to chastise his wife in a reasonable manner.

Sir Matthew Hale was a great authority on the law of burning witches, and any modification of the rude rules of the common law laid down by him would probably not mark the high-water limit of modification. Incidentally we may remark the striking instances, which the reader will find in perusing the cases where that very learned lawyer, as he was reputed to be, presided in the courts, of arguments by the court why witches should be burnt. It shocks the modern mind to pass from one case where the learned Lord Chief Justice has dealt, with infinite pains, with the ancient and highly reasonable maritime laws, on which he was probably the greatest authority, to the next case, where, with equal pains, he deals with the barbarous law of witch-burning and shows the excellent reasons, as he thought, why these unfortunate persons should be burned at the stake.

Blackstone lays the survival of the privilege of wife-beating at the door of what he calls the lower rank of people. He says (1 Bla. Com., chap. 15) that "the lower rank of people, who were always fond of the common law, still claim and exert their ancient privilege, and the courts of law still permit a husband to restrain a wife of her liberty in case of any gross misbehavior." Frankly, we doubt if it was even in Blackstone's day the law-loving portion of the community who exercised this supposed privilege. To be fair to Blackstone, however, we must point out that he treated the whole thing, as it were, in the past tense. It was by the old law that the husband might give his wife moderate correction, that learned writer said. Yet he put it all on a very reasonable ground. Speaking of the husband, he says: "As he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children, for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife."

Let it be appreciated at once that this article is not intended to encourage any husband to revive the so-called privilege. On the contrary, the law would very soon deal with such a revival, and visit the husband with the punishment he would deserve. The law has developed along more reasonable and humane lines since even the days of Blackstone, although the true answer to a complaining husband has not as yet found popular expression—viz., that if a man is a sufficient fool to marry a woman who requires beating, he deserves his sorrows. Such an answer is often given to a wife's complaints of her husband. It ought to be given with equal freedom in the reverse case. No, our object in raking up this so-called privilege is merely to point out that it was not based on a one-sided ground. There was, as it were, a consideration for the privilege—namely, that the husband was, and, moreover, still is, responsible in law for his wife's torts.

It is with the husband's liability for hs wife's torts that we propose to deal. Generally speaking, a wife could not commit a tort in the eye of the law, or, to put it in another way, any tort she committed as against third parties was a tort committed by her husband. There is, of course, abundant authority for this proposition. Let the reader refer to the judgment of Sir George Jessel when Master of the Rolls, in the case of Wainford *v.* Heyl (33 L. T. Rep. 155; 20 Eq. 321). This, of course, relates primarily to torts committed during coverture. But the point to observe is that this liability of the husband is a joint liability. He is jointly responsible with his wife to the person against whom she has committed the tort.

When the Married Women's Property Act 1882 was passed, questions arose whether this joint liability was affected by the Act. Up to the passing of that Act the wife had no property which was not her husband's except her separate estate under the doctrine of equity, her paraphernalia, and certain things secured to her under previous statutes. The effect of the Act of 1882 was to secure to her, as it were, a statutory separate estate. Wherefore, it was suggested, her statutory separate estate was a fund for discharging her liabilities, whether in tort or contract. To put such a construction on the Act would be, as was pointed out by Mr. Justice Mathew in the important case of Seroka *v.* Kattenberg (54 L. T. Rep. 649; 17 Q. B. Div. 177, at p. 179), to make the Act one for relief of husbands, and not an Act affecting the property of married women. In that case the court held that the Act did not relieve the husband from his old liability to be sued jointly with his wife in respect of his wife's torts, although the plaintiff might, at his own option, sue the wife alone and obtain judgment against her and have execution issued against her separate property. If she has no such separate property, the plaintiff may still sue the husband as a co-defendant.

The case of Seroka *v.* Kattenberg (sup.) was decided by Mr. Justice Mathew and Mr. Justice A. L. Smith. The decision was in effect confirmed by the Court of Appeal in Earle *v.* Kingscote (83 L. T. Rep. 577; (1900) 2 Ch. 585). The same point was raised and dealt with again before the Court of Appeal in the case of Beaumont *v.* Kaye (90 L. T. Rep. 51; (1904) 1 K. B. 292) in, however, a somewhat less direct manner, the exact question in the latter case being on a point of pleading. And these three cases may be regarded as the standing authorities for the proposition that a husband is still liable, jointly with his wife, for torts committed by her during coverture.

We ought here to notice that the proposition thus laid down by the three last-mentioned cases was very severely criticised by Mr. Justice Fletcher Moulton in the more recent case of Cuenod *v.* Leslie (100 L. T. Rep. 675; (1909) 1 K. B. 880, at p. 889). That learned Lord Justice expressed the opinion that it was most desirable that the matter should be reviewed by the House of Lords, because, in his Lordship's view, the present state of things is highly anomalous. "I cannot believe," said his Lordship, "that the Married Women's Property Act 1882, which drew such a clear line of separation between the husband's and the wife's property and liabilities and arranged them in other respects so fairly on the lines of separate personal responsibility, could have intended to leave such a blot on the legislation as would follow from permitting a plaintiff to recover damages from a husband in respect of torts of the wife, either before or after coverture, although he was not liable for the torts or any participation in them, and was not needed as a party to the action."

These remarks of the learned Lord Justice, as he then was, are certainly deserving of weight, and they may serve the purpose of reminding the reader that the last word on the subject has not yet been heard. It may be that the House of Lords may take a different view to the several learned Lords Justices and judges who decided the three cases we have mentioned. Yet one cannot but feel the weight of Mr. Justice Mathew's remark that to put any other construction on the Act would be to make it an Act for relieving husbands and not an Act for dealing with the wife's property.

In truth, it would seem the husband has come off badly in the course which the development of the law has taken. He has lost his privilege of gentle chastisement while still retaining his liability for his wife's torts. The Legslature has destroyed the comfortable doctrine that the wife's property belongs to the husband. The old doctrine embodied in the homely and apt phrase in the mouth of the husband, "What is thine is mine, and what is mine is my own," has gone, together with his homely privilege of correction. Yet he continues liable for his wife's torts, although he may never have known of the commission of such torts till he hears of it through the plaintiff. Now, until the House of Lords thinks fit to do so—if the House of Lords is prepared to override the decisions of a considerable number of eminent lawyers—and until occasion arises, the husband must submit to things as they are.

Some further observations ought to be added on this liability of the husband for his wife's torts. The liability of the husband, is, as we have pointed out, a liability to be sued jointly with her. The foundation of this liability was originally that she could not be sued alone. When judgment was obtained against the defendants it was a personal judgment against both. But if the wife died while the action was pending and before judgment, the whole action fell to the ground. On the other hand, if the husband died while the action was pending, the action was continued against the wife alone. The ground for the husband's liability in such cases was not, nor is it still, that he participated in or must be taken to have known of the tort. "During coverture," said Chief Justice Erle in the case of Capel *v.* Powell (17 C. B. N. S. 743, at p. 748), speaking of the law as it stood in 1864, "the wife has no such existence as to enable her to be a suitor in her own right in any court, neither can she be sued alone. For any wrong committed by her she is liable, and her husband cannot be sued without her, neither can she be sued without joining her husband. Seeing that all her property is vested in the husband, it would be idle to sue the wife alone—the action would be fruitless."

The remarks of Chief Justice Erle in the last-mentioned case certainly support the view put forward by Lord Justice Fletcher Moulton, as he then was, in the case of Cuenod *v.* Leslie (sup.). It certainly seems illogical that, when the Legislature has given to the wife the right of acquiring, holding, and disposing of property as if she were a *feme sole*, and it was, as we have seen, only really an accident of the law that the husband had to be joined as a co-defendant in any action in respect of the wife's torts merely because at that time she could not hold property herself, the husband should still be liable to be joined as a co-defendant when the original purpose or necessity for such joinder has now disappeared.

It is, of course, notorious that tort and contract trench the one upon the other. Where an alleged tort by a wife is in truth a wrong so connected with contract as to give a remedy in breach of contract only, the husband is not liable. As the old law stood, a wife was incapable of binding herself by contract. No action lay either against the husband or the wife for a breach of an alleged contract which the wife had purported to enter into. In the case of fraud committed by the wife in respect of any contract, and which was directly connected with the contract and was the means of effecting it, and parcel of the same transaction, the matter was looked upon as grounded on contract, and neither the husband nor wife could be sued, either alone or together: (see Liverpool Adelphi Loan Association *v.* Fairhurst, 9 Ex. 422). On the other hand, however, where a contract was entered into by a married woman in respect of her equitable separate estate, that equitable separate estate was liable to make good such contract. As to this, the reader is referred to the judgment of Sir George Jessel in the case of Wainford *v.* Heyl (Sup.).

In the recent case of Cole *v.* De Trafford (117 L. T. Rep. 224) the court held that a husband was not liable jointly with his wife for damages arising in respect of an accident to the plaintiff, who had been employed by the wife to drive her motor-car. The court looked upon the cause of action as arising out of contract and not out of tort, and, on the principle above mentioned, held that the husband had been properly dismissed from the action.—*Law Times.*

## Cases of Interest

VALIDITY OF STATUTE REGULATING SALE OF SEED.—The validity of a pure seed law enacted by the legislature of Tennessee was upheld in State *v.* McKay, 137 Tenn. 280, 193 S. W. 99, reported and annotated in Ann. Cas. 1917E 158. The statute regulated the standard of purity of seed, and required the labeling of packages, but exempted from its operation seed sold by a resident grower thereof on his own premises. The case of *In re Sanders*, 52 Fed. 802, 18 L. R. A. 549, which held to be invalid a somewhat similar statute, was stated at length and distinguished.

NEWSPAPER CARTOON AS LIBEL.—The usual definition of libel includes the publication of defamatory matter by "printing or

writing or by signs and pictures," and that this may include a newspaper cartoon is the holding in Newby *v.* Times-Mirror Company, 173 Cal. 387, 160 Pac. 233, reported and annotated in Ann. Cas. 1917E 186. The suit was for libel and it was held that an implied finding that a newspaper cartoon would not to an ordinary reader bear the meaning that plaintiff was a hypocrite posing as a reformer was unwarranted, it being headed, "And These are Our Leading 'Reformers,'" below it being, "All hypocrites are sinners, but, thank God, all sinners are not hypocrites," and the persons, other than plaintiff, shown, being portrayed as engaged in transactions disreputable, dishonest, or ridiculous, and plaintiff with a sinister expression.

RIGHT TO IMPOSE DISCRIMINATORY TAXES AGAINST INTANGIBLE PROPERTY OF RAILROAD.—Certain discriminating tax legislation against railroads is declared invalid in Greene *v.* Louisville, etc., R. Co., 244 U. S. 499, reported and annotated in Ann. Cas. 1917E 88, and the rule is laid down that a state statute whereby the intangible property of a railroad company is to be assessed at seventy-five per cent of its actual value while the property of individuals and other corporations is assessed at sixty per cent of its actual value is in violation of a provision of the state constitution requiring uniformity of taxation. With respect to the remedy of a corporation thus unequally taxed it is held that a provision for readjustment and equalization does not afford an adequate remedy; that injunction will accordingly lie to restrain the enforcement of the unequal tax; and that equity, having acquired jurisdiction, will dispose of the entire case though as to some of the taxes complained of an adequate legal remedy may exist.

DESTRUCTION OF DISEASED FRUIT TREES AS WITHIN POLICE POWER OF STATE LEGISLATURE.—The case of Louisiana State Board of Agriculture and Immigration *v.* Tanzmann, 140 La. 756, 73 So. 854, reported and annotated in Ann. Cas. 1917E 217, holds that the destruction by legislative authority of orange trees affected by a disease for which no cure has been discovered and which is highly contagious and infectious is not a taking of private property for a public purpose without previous adequate compensation, nor a taking of such property without due process of law, but is a competent exercise of the police power of the state. The opinion of the court in part reads as follows: "The proposition that, though all the orange groves in the state may, in the meanwhile, be destroyed by citrus canker, defendant should be allowed to maintain that disease in his grove, upon the chance that he may discover, and until he does discover, a remedy for it which may be less drastic than the burning of the trees, is untenable. The owners of the other groves are entitled to protection now before the destruction emanating from defendant's place overtakes their groves."

WHAT CONSTITUTES TOTAL DISABILITY.—A rather novel state of facts necessitating a construction of what constitutes a "total and permanent disability" under the Workmen's Compensation Act will be found in Weaver *v.* Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993, reported and annotated in Ann. Cas. 1917E 238. The case was decided under a statute providing that the loss of both eyes or both legs should constitute a total and permanent disability and the facts showed that the claimant had in a previous accident lost one eye and in the accident in question another. It was held that the injury could not be considered a total disability. The court said: "In the instant case the loss of the first eye was a partial disability for which, if our workmen's compensation law had been in existence, the then employer would have been liable, and for which disability the present employer was in no degree the cause. The loss of the second eye, standing by itself, was also a partial disability, and of itself did not occasion the total disability. It required that, in addition to the results of the disability occasioned by the accident of seven years ago, there should be added the results of the partial disability of the recent accident to produce the total disability. The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity cannot be entirely attributed to the last accident. It follows that the compensation should be based upon partial incapacity, and it is so ordered."

DAMAGES IN ACTION FOR BREACH OF CONTRACT BY PHYSICIAN.—The character of damages recoverable in the case of a breach of contract by a physician to treat a patient was in issue in Hood *v.* Moffett, 109 Miss. 757, 69 So. 664, reported and annotated in Ann. Cas. 1917E 410. The conclusion rendered was that where a physician breached a contract to treat a patient and physical pain resulted, damages might be recovered for mental anguish accompanying it, but exemplary damages could not be recovered. On the subject of exemplary damages the court said: "The jury should not have been instructed, however, to award punitive damages. This is a suit for damages alleged to have been sustained because of the breach of a contract, and the rule is, with probably two exceptions, and within neither of which does the case at bar come, that such damages are not recoverable in such an action unless the act or omission constituting the breach of the contract amounts also to the commission of a tort. 8 R. C. L. 604; 3 Elliott on Contracts, section 2124; 13 Cyc. 113; 12 Am. & Eng. Enc. of Law (2d ed.) 20. This error, however, was harmless, for the reason that since the amount of damages awarded is only one hundred and fifty dollars, it cannot be said that the jury responded to the instruction and included in the verdict an award for punitive damages."

WHEN PERSON REPORTING OFFENSE TO OFFICER NOT LIABLE FOR ARREST MADE WITHOUT WARRANT.—It is well settled that where a private person induces an officer by request, direction or command to arrest another without a warrant and without an offense having been committed in view of the officer, he will be liable for false imprisonment unless he justifies by showing that the charge was well founded, but in Lemon *v.* King, 95 Kan. 524, 148 Pac. 750, reported and annotated in Ann. Cas. 1917E 401, it is held that one who in good faith reports to a police officer the violation of a city ordinance, and at the same time asks that the violator be arrested, but does not assume to say what steps shall be taken to that end, is not thereby rendered liable for damages because the arrest is made without the issuance of a warrant. The court said: "It is said that 'The person making the complaint upon which the warrant issues is not liable if he states the facts to the magistrate, even though such facts do not authorize the issuance of a warrant.' (Note, 67 Am. St. Rep. 411.) By analogy it would seem that where a citizen makes a truthful statement to an officer of facts justifying an arrest, the mere fact that he asks that the law be enforced, without assuming to declare the precise procedure, should not make him liable in damages because the formality of procuring a warrant is not observed."

INJURY TO EMPLOYEE IN STREET AS ONE ARISING OUT OF AND IN COURSE OF EMPLOYMENT.—A late decision in England, namely, Dennis *v.* A. J. White & Co., [1917] A. C. 479, declares authoritatively the English rule on a question as to which there has been much conflict in the decisions. The case which is reported and annotated in Ann. Cas. 1917E 325 holds that if an employee is sent into the street on his employer's business and an accident occurs whereby he is injured arises out of and in the course

of his employment within the workmen's compensation act, though the risk is one to which all persons using the street are equally subject. Earl Loreburn in his opinion says: "Some of the learned judges seem to be of opinion that a risk is incidental to an employment only if it be one that is peculiar to the employment or one which other people do not share. I cannot assent to that view. It would enormously restrict the language of the Act. Many risks may be incidental to an employment which are common to almost every one, such, for example, as the dangers of the street, which last is this very case. It is one thing to say that if an employment peculiarly exposes a man to a risk that risk is incidental to the employment. It is quite a different thing to say that if other people are also exposed to the risk then the risk is not incidental to the employment."

ESTOPPEL BY REMARRIAGE TO ATTACK DECREE OF DIVORCE.—The proposition that a remarriage estops the party entering into it from denying the validity of a previous divorce is upheld in Bruguire *v.* Bruguire, 172 Cal. 199, 155 Pac. 988, reported and annotated in Ann. Cas. 1917E 122. There it was held that where the wife, knowing that her husband had obtained a divorce decree in Nevada, married another and lived with the new husband for several years, she was precluded from setting up that the Nevada decree was invalid because obtained on a fraudulent residence, established in that state, and from claiming marital rights against her former husband, though at the time of her remarriage she did not know of the alleged invalidity of the decree. The court said: "The appellant cites Norton *v.* Tufts, 19 Utah 470, 57 Pac. 409, and Sammons *v.* Pike, 108 Minn. 291, 133 Am. St. Rep. 425, 23 L. R. A. (N. S.) 1254, 120 N. W. 540, 122 N. W. 168, in support of the opposite doctrine. In Norton *v.* Tufts there was no previous divorce, but only a so-called 'church divorce,' under the sanction of the Mormon church. In point of law it was no more than an agreement of separation, but the parties supposed it to be a dissolution of the marriage. Both of them married again. It was held that she remained his wife and was not estopped to claim dower in his land against one who had taken a mortgage from the husband. Inasmuch as there was not even the semblance of legal proceedings for a divorce, to hold that an estoppel arose from the subsequent marriage would be the equivalent of saying that a divorce could be secured by contract. In Sammons *v.* Pike, there was no subsequent marriage by the wife, nor even acquiescence by her in the divorce except so far as mere inaction constituted acquiescence. The cases do not apply to the facts here under consideration."

JURISDICTION OF OFFENSE COMMITTED PARTLY IN ONE STATE AND PARTLY IN ANOTHER.—A nice question concerning jurisdiction arose in People *v.* Zayas, 217 N. Y. 78, 111 N. E. 465, reported and annotated in Ann. Cas. 1917E 309. It involved the construction of a New York statute providing that a person who committed within the state any crime in whole or in part was liable to punishment within the state, and the holding of the court was that it was not necessary to jurisdiction of the New York courts over a prosecution for obtaining money by false pretenses, based on acts committed partly in another state, that the transaction should constitute a crime under the law of the foreign state where part of the act was committed; it being sufficient that the transaction would be a crime under the law of New York if committed entirely within this state. Seabury, J., for the court, stated the facts more fully in the following language: "This count charges grand larceny in its first degree. It charges the form of larceny known as false pretenses. It alleges that the false pretenses were made in the county of New York, state of New York, and that by reason thereof the complaining witness delivered money or property to the defendants in the city of Philadelphia, in the state of Pennsylvania. It is not necessary to set forth in detail these allegations, as the demurrers raise only the question whether the fact that the false pretenses were made in New York, and the money or property obtained in another state, renders this count of the indictment insufficient in law. This question must be determined under the statutes of this state. Section 1930 of the Penal Law of the state provides, in part, as follows: 'The following persons are liable to punishment within the state: (1) a person who commits within the state any crime, in whole or in part.' The word crime as used in this statute should be construed solely with reference to the Penal Law of the state of New York. In People *v.* Arnstein, 211 N. Y. 585, 592, 105 N. E. 814, Chief Judge Bartlett said: 'The determination of this appeal really depends upon the meaning of the words "any crime" in subdivision 1, section 1930, of the Penal Law. . . . I have reached the conclusion that the phrase *any crime* in subdivision 1 of section 1930 of the Penal Law means any offense which, if committed wholly within the state of New York, would constitute a crime against the laws of New York. Our law is made the test of criminality, and one who commits part of such offense here and part elsewhere is punishable here. I think this is the natural meaning of the language used in the statute, and I can find no reason which ought to constrain us to interpret it otherwise.' "

RIGHT OF EMPLOYEE UNDER WORKMEN'S COMPENSATION ACT TO COMPENSATION FOR INJURY NOT IMPAIRING EARNING CAPACITY.—It is loss or impairment of earning capacity and not permanent physical injury which determines the question of compensation under the Workmen's Compensation Act of Rhode Island as construed in Weber *v.* American Silk Spinning Co., 38 R. I. 309, 95 Atl. 603, reported and annotated in Ann. Cas. 1917E 153. That disfigurement alone is not sufficient to warrant making of compensation in the absence of statute is seen from the annotation, which in part reads as follows: "In the reported case it is held that no compensation can be recovered under a workmen's compensation act for a permanent physical injury which does not result in any loss of earning capacity. So in Johnstad *v.* Lake Superior Terminal, etc., Co., 165 Wis. 499, 162 N. W. 659, it was held that prior to the amendment of the Act in 1915 no compensation could be had for disfigurement in the absence of a loss of earning capacity. But in Frankfort General Ins. Co. *v.* Pilsbury, 173 Cal. 56, 159 Pac. 150, it was held that disfigurement may be considered in fixing the amount of compensation. So in Shinnick *v.* Clover Farms Co., 90 Misc. 1, 152 N. Y. S. 649, it was said: 'Section 15 contains a schedule of compensation for various disabilities, including the loss of a finger, hand, arm, foot, leg and eye—that is, the loss or impairment of the use of a member of the body which is of valuable assistance in the performance of labor. But the statute does not provide any rate of compensation for injuries which may not disable the employee, but which may constitute injury to him through disfigurement or otherwise, as by the loss of an ear or the nose. The defendant admits that the plaintiff has lost a part of his ear as a result of the defendant's negligence; and as it cannot be assumed that the legislature, in enacting the beneficent provisions of the workmen's compensation law, intended to deprive an employee of the right to recover damages for injuries not constituting disabilities within the meaning of the statute, the order must be affirmed.' In Illinois, the statute expressly provides for compensation for disfigurement, which is allowable without reference to a loss of earning capacity. Stevenson *v.* Illinois Watch Case Co., 186 Ill. App. 418; Watters *v.* P. E. Krochler Mfg. Co., 187 Ill. App. 548."

VALIDITY OF FARM LOAN ACT.—The Montana legislature in the year 1915 passed an act known as the Farm Loan Act designed to assist agriculturists in securing loans on their real estate by and through the activities of a public department, aided to a greater or less extent by public funds, and thus to confer upon that particular class certain privileges not enjoyed by any other. The Act was attacked as unconstitutional in Hill *v.* Rae, 52 Mont. 378, 158 Pac. 826, reported and annotated in Ann. Cas. 1917E 210, but it was held that there was nothing in the general scope and purpose of the Act which constituted a denial of the equal protection of the laws as contended by those attacking the legislature. The court said: "The question then is whether, within the lines thus drawn, the selection of agriculturists for the particular form of consideration here accorded can be justified. We think it can, bearing in mind that with the accuracy or wisdom of the legislative view we may not concern ourselves. (Mobile County *v.* Kimball, 102 U. S. 691, 26 U. S. (L. ed.) 238; Magoun *v.* Illinois Trust, etc., Bank, supra; Atchison Trust, etc., Co., *v.* Matthews, 174 U. S. 96, 102, 43 U. S. (L. ed.) 909, 19 S. Ct. 609; Clark *v.* Kansas City, supra; Billings *v.* Illinois, 188 U. S. 97, 102, 47 U. S. (L. ed.) 400, 23 S. Ct. 272.) It is a matter sufficiently notorious to charge the court with judicial knowledge that, according to the federal census of 1910, approximately one-third of our productive population is engaged in agriculture. From time immemorial it has been fully realized that the economic relations of that pursuit to all other forms of human activity are of the first importance; other things, other occupations, may be dispensed with at more or less cost to society, but without agriculture, civilization itself must fail. For several years last past there has been growing the conviction, based to some extent on government investigations and reports, that farmers requiring money to carry on and extend their operations are subjected to disadvantages which, not altogether necessary and not suffered by other classes, seriously hamper, if they do not imperil, the progress and welfare of agriculture. The rectification of this condition has engaged and is engaging the attention of Congress as well as the attention of several of the states. At the general election of 1914 the people of this state undertook to aid in the solution of the problem by means of the initiative, authorizing farm loans to be made out of the school funds, and the governor in his annual message to the Fourteenth Legislative Assembly directing notice to certain constitutional objections which had been raised against such use of school funds, urged the subject of farm loans upon the legislative mind. In the light of these circumstances it is impossible to avoid the conclusion that the subject appeared to be one 'held by the strong and preponderant opinion to be greatly and immediately necessary to the public welfare' (Noble State Bank *v.* Haskell, supra), and that, whether wisely or not, the legislature, in enacting the law in question, did believe that it was legislating to develop the resources of the state and to add to its prosperity. It is not our province to assert that this was a mistaken belief."

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"The law presumes that every man in his private and official character does his duty, and even acts done by a corporation which pre-suppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." Per Finch, J., in Swarthout *v.* Ranier, 143 N. Y. 504.

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"Canons of construction are rules which have been evolved by centuries of experience, but they are like trees blazed in the forest; they guide the traveler in a general direction without fixing a well-defined and certain path." Per Howard, J., in Matter of Clarke, 174 N. Y. App. Div. 740.

# New Books

*A Treatise on the Law of Inheritance Taxation.* With Practice and Forms. By Lafayette B. Gleason, Attorney for State Comptroller for New York City, and Alexander Otis of the New York City Bar. Albany and New York City: Matthew Bender & Company. 1917.

Inheritance taxation has become so important a subject in the law that a new book devoted to its study is very welcome. Mr. Gleason has had much experience in the interpretation of transfer tax legislation, and he has written a practical book which should find favor. The subject has been treated as a distinct branch of jurisprudence, co-ordinating the decisions and statutes into a body of law gradually developed by the legislation and litigation of the last twenty years. The law is discussed under six topics as follows: First: The nature of the tax and the constitutional principles that limit and control its imposition. Second: The different transfers taxable; viz., by will, intestate law, gift in contemplation of death, etc. Third: The parties and their interests, residence of the decedent, relationship of beneficiaries, exemptions, life estates, remainders, mortuary tables and calculations of the value of life interests. Fourth: The property transferred, and the problems arising out of its situs and valuation. Fifth: Procedure, necessarily confined to the New York practice, though it is largely followed in other states, and authorities from those states are cited where applicable. Sixth: General résumé of the statutes and an extended discussion of the provisions of the Federal and New York acts. There is an Appendix which gives the New York Decedent Estate Law, New York Forms and the inheritance tax statutes of all the states with tables showing the rates of tax and exemptions in each state. The book also contains the tables of mortality used as the basis of inheritance tax calculations in all the states, lists of the principal stock corporations showing the state of incorporation and whether there taxable, names and addresses of the officers of the several states and of the Federal internal revenue to whom attorneys should write for blank forms and information; and the usual table of cases giving citations from every jurisdiction imposing inheritance taxes.

*The Law and Practice in Bankruptcy.* By Wm. Miller Collier. Eleventh Edition by Frank B. Gilbert. Albany: Matthew Bender & Company. 1917.

It has been three years since the tenth edition of this well-known and widely used work was published, and we are told that in the meantime more than two thousand bankruptcy cases have been decided and two important amendments enacted materially affecting bankruptcy practice. The editor in a preliminary statement says: "The work has been largely rewritten and many parts of it have been rearranged. The general scheme of retaining the sections of the Bankruptcy Act as the basis of the work, placing the discussion or treatise under the several sections, has been so well received by the profession that it has been deemed advisable to retain this method of treatment. The analysis of subject-matter under the section has been made more in detail—many headings have been inserted which were not in former editions. This will obviously make the great mass of the law more available for use. The notes have been much amplified by including therein copious extracts from decisions and findings of the court on important matters. The cases which merely reiterate previous rulings have been cited in their appropriate connection."

As in former editions this edition contains the official forms; supplementary forms; rules of practice for the courts of equity of the United States, and the text of the various Bankruptcy Acts. The very fact that this publication has seen so many

editions testifies to its value. Commendation, therefore, is superfluous. It is enough to say that the edition at hand has been prepared by the editor of most of the previous editions, and that it does not suffer by comparison.

*Roman Law in the Modern World.* By Charles Phineas Sherman, D.C.L., A't Professor of Roman Law in Yale University; Member of the Bar of Connecticut, etc. Boston: The Boston Book Company. 1917.

The increasing realization in the United States of the value of Roman law, practically, philosophically and professionally, makes this a work of timely importance to the American lawyer. The scope of the work covers a wide field, but the author's arrangement is so methodical and scientific, and his treatment so intensive, that a comprehensive exposition of the subject is comprised in two volumes, with a third as a subject guide to the texts.

The first volume is a history of Roman law and its descent into French, German, Italian, Spanish, English, American and other modern law. The volume is a historical and philosophical introduction to the development of modern law. It begins with the genesis of Roman law as a local city law, describes its evolution into the body of legal principles fit to regulate the world, portrays its establishment as a world law, and closes with an account of the universal descent or reception of the Civil Law into modern law. The historical development, especially of modern English law in England and the United States, is of fascinating interest. The reader will doubtless be startled by the picture of American law as an amorphous chaos with its confusion, bulkiness, redundancy and prolixity, increased annually by some 20,000 new statutes and 25,000 new reported cases which make our law in the language of the author "the most intolerable in the world and perhaps the worst ever known to human history." The remedy for this he finds in one code, after the Roman method, for all the United States, the objections to which are fairly and cogently considered.

The second volume is a manual of Roman law illustrated by Anglo-American law and the modern codes. And here fortunately Dr. Sherman does not take for granted the reader's familiarity with the principles of Roman law. He gives us not only a commentary but an exposition. The volume sets forth the principles of the Civil Law, more especially private law. These are arranged systematically in the order of a code and copiously illustrated, as to their survival, from Anglo-American law and the modern codes. Here the study of the Romanization of American law, of the extent to which the United States is now under the dominion of Roman jurisprudence and is at present repeating the activity of Rome in legislation, is of surpassing interest. There are many side lights on the institutions under which the Romans lived which aid in an understanding of the rules laid down by the Roman jurists.

The third volume contains Roman and modern guides to the subjects of the entire work, an exhaustive bibliography of Roman law and a comprehensively circumstantial index.

This scholarly work cannot be too cordially commended. It will prove indispensable to specialists in this field of legal study, and its superior method, clarity and felicity of style pre-eminently fulfil the requirements of the nonprofessional student and general reader interested in the progress of American jurisprudence.

*Equity in Its Relations to Common Law.* By William W. Billson, of the Minnesota Bar. Boston: The Boston Book Company. 1917.

The subject of this volume is necessarily somewhat academic but none the less interesting to the student of legal developments. Masters of equity have reached diametrically opposite conclusions in their theories of equity jurisdiction, and the relation of Equity to the Common Law still remains a much mooted question. What is the origin of equity jurisdiction? Precisely what were the defects of the common law which called equity into existence? Had equity a distinct ethical quality? Were the moral standards of the two systems in substance the same? Were there in the common law rigors which it was an office of equity to mitigate; deficiencies not ultimately referable to mere remedial incapacity, which equity was authorized to supply? What was the character and extent of equity's ethical superiority to the common law? What is the limit within which equity has been able to enforce her own standards adversely to those of the common law? These and related questions are discussed in developing the general theory that equity has relieved from imperfections in the common law not referable to procedural incapacity. The author takes the view that equity has not been restricted to the relief of such common-law defects as were due to inadequacies of procedure but has had for its province as well to enforce a superior morality by relieving in the interest of good conscience against many types of defects in the common law. The directions in which equity has assumed to enforce her more highly moralized standards and methods in counteraction of the substantive law are classified, and through three, i.e., the revaluations of form and substance, the doctrines of fraud and of uses and trusts, the author's theories are forcefully sustained.

## News of the Profession

THE NEW YORK STATE BAR ASSOCIATION will hold its annual meeting in New York city on January 11 and 12.

THE KANSAS STATE BAR ASSOCIATION will meet in annual convention at Topeka, Kan., on January 30 and 31.

THE WYOMING STATE BAR ASSOCIATION will hold its annual meeting at Douglas, Wyo., on January 28 and 29.

THE MISSOURI COUNTY JUDGES' ASSOCIATION held its annual convention at Jefferson City, Mo., on December 11 and 12.

NAMED ASSISTANT UNITED STATES ATTORNEY. — Thomas J. Walsh of Humboldt has been appointed assistant United States attorney at Memphis, Tenn.

APPOINTED PROBATE JUDGE.—Herman S. Vaubel of Wapakoneta has been named by Governor Cox of Ohio as probate judge of Auglaize county to succeed Judge Otto T. Boesel, resigned.

WASHINGTON LAWYER TO BE LEGAL ADVISER IN CHINA.—William C. Dennis, a well-known attorney of Washington, D. C., has accepted the position of legal adviser to the Chinese government.

OREGON JUDGE REAPPOINTED.—Governor Withycombe of Wisconsin has reappointed C. U. Gantenbein to the bench of the Circuit Court for Multnomah county, succeeding Judge E. V. Littlefield, resigned.

NAMED SUPERIOR JUDGE.—Governor Goodrich of Indiana has appointed Thomas D. Mott of South Bend to the bench of the St. Joseph County Superior Court to fill out the unexpired term of the late Judge George Ford.

VETERAN ILLINOIS JURIST DEAD.—Henry Phillips, former county judge of Cass county, Illinois, and prominent in the ranks of Illinois Odd Fellows for many years, died at Beardstown, Ill., on November 12, aged 81 years.

FORMER MINNESOTA JUDGE DEAD.—Charles E. Otis, judge of the second judicial district of Minnesota for fourteen years and one of the leading members of the bar of that state, died at St. Paul, Minn., on November 8.

NEW TENNESSEE JUDGE.—Governor Rye of Tennessee has appointed A. W. Chambliss of Chattanooga as special judge of the Court of Civil Appeals in place of Judge H. Y. Buchanan of Tazewell, who is incapacitated by reason of illness.

FEDERAL JUDGE DEAD.—Waller T. Burns, judge of the United States District Court for the southern district of Texas, died at Laredo, Tex., on November 17. Judge Burns received his appointment to the bench from President Roosevelt.

SOLDIER-JURIST DEAD IN OHIO.—Joseph R. Johnston, a veteran officer of the civil war, formerly probate judge of Mahoning county, and a judge of the Ohio Court of Common Pleas, died at Youngstown, Ohio, on November 2, aged 77 years.

APPOINTED TO SUPREME COURT BENCH.—Howard L. Townsend of Fort Wayne has been appointed by Governor Goodrich as associate justice of the Indiana Supreme Court, to fill the vacancy caused by the death of Judge Richard K. Erwin.

DEATH ENDS LONG LEGAL CAREER. — Lyman R. Critchfield, attorney general of Ohio from 1862 to 1864, and a practitioner at the bar for sixty-four years, died at Millersburg, Ohio, on November 28, at the advanced age of 86 years.

RESIGNATION OF WISCONSIN JUDGE.—Judge A. G. Derse, now serving as captain of the machine gun company of the 128th infantry, Waco, Tex., has resigned as judge of the Municipal Court of the Western District at Oconomowoc, Wisconsin.

DEATH OF NORTH DAKOTA JUDGE.—John F. Cowan, former attorney general of North Dakota, judge of the District Court of that state from 1898 to 1912, and prominent in Masonic circles, died at Devils Lake, N. Dak., on November 26, aged 59 years.

LAW POST FOR WISCONSIN MAN.—John Walsh of Washburn, Wis., has been appointed chief counsel of the federal trade commission at Washington, D. C. Mr. Walsh has been with the commission for the past two years and has recently been acting chief counsel.

DEATH OF DISTRICT OF COLUMBIA JUDGE.—Seth Shepard, chief justice of the Court of Appeals of the District of Columbia, died at Washington, D. C., on December 3, aged 70 years. Justice Shepard was a Texan by birth and was appointed to the bench by President Cleveland in 1893.

ILLINOIS JUDGE RESIGNS.—Judge Daniel W. Maddox of the City Court of Litchfield, Ill., has resigned from the bench, having been commissioned as a First Lieutenant at the Fort Sheridan training camp and assigned to infantry service at Petersburg, W. Va.

DEATH OF PENNSYLVANIA JUDGE.—Harry Alvan Hall, president judge of the Elk-Cameron-Clinton district of the Court of Common Pleas of Pennsylvania, and formerly United States attorney for the Western District of Pennsylvania, died at Philadelphia, Pa., on December 1, aged 56 years.

DISTINGUISHED PENNSYLVANIAN DEAD.—Robert W. Irwin, additional law judge of Washington county, and one of the leaders at the bar of Western Pennsylvania, died suddenly at Washington, Pa., on November 11, aged 59 years. Judge Irwin had just been re-elected to the bench for a term of ten years.

OREGON BAR ASSOCIATION.—The annual session of the Oregon Bar Association was held at Portland, Ore., on November 20 and 21. Samuel C. White, president of the association, presided. Addresses were delivered by H. S. McCutchan, Harrison G. Platt, Circuit Judge Robert S. Tucker, and Supreme Court Justice Lawrence T. Harris.

HAWAIIAN JUDGES RESIGN.—Edward M. Watson, Associate Justice of the Supreme Court of Hawaii, and Charles F. Clemons, Senior Judge of the United States District Court for the District of Hawaii, have resigned their respective positions to enter the practice of law together in Honolulu under the firm name of Watson & Clemons.

JUDGE LOBINGIER GUEST OF BAR ASSOCIATION.—On the occasion of his recent visit to this country, the Bar Association of San Francisco gave a luncheon in honor of Judge Charles Sumner Lobingier of the United States Court for China. Assisting in the welcome to the distinguished jurist were the China Commerce Club and the Chinese Consul General.

PROMINENT JURIST AND MASON DEAD.—Justice George Freifeld, who had just been re-elected to the bench of the Second District Municipal Court of New York City for a term of ten years, died suddenly at that city on November 17, aged 61 years. Justice Freifeld was known throughout the country through his Masonic connections. In 1914 and 1915, he was Grand Master of the Grand Lodge of Masons in the State of New York.

APPOINTED GENERAL COUNSEL OF WAR RISK INSURANCE BUREAU.—Stuart G. Shepard, a Chicago attorney, has been appointed by Secretary McAdoo as general counsel of the war risk insurance bureau, which has charge of the insurance of men in military service and is designed to supplant the old pension system. Mr. Shepard is a son of the late Henry M. Shepard, for over twenty years a judge of the Cook County Circuit and Appellate Courts.

MINNESOTA JUDICIAL APPOINTMENTS.—George E. Rice of Foley has been appointed by Governor Burnquist of Minnesota to the probate bench of Benton county to fill the vacancy caused by the resignation of Judge F. C. Lance. Governor Burnquist has also appointed Frank J. Conway of Waseca to be judge of the municipal court of that city to succeed the late Judge Peter McGovern, and has named N. R. Reynolds as judge of the new municipal court of Luverne.

SHRINKAGE OF LAW SCHOOL STUDENTS.—The Harvard Law School has only 296 men enrolled this year, as against 858 a year ago. Harvard men still lead, with 73 now enrolled, although there were 212 of them in 1916. Yale, which had 83 of its alumni studying at Cambridge a year ago, now has only 13, and Princeton, which had 55 in 1916, now has only 14. Brown has dropped from 26 to nine, Dartmouth from 34 to 11, Williams from 20 to four and Wisconsin from 15 to one.

THE COUNTY JUDGES' ASSOCIATION OF KENTUCKY held its annual meeting at Louisville, Ky., on December 12 and 13. The following addresses were on the program: "The New Tax Law," by Judge J. E. Boltz, of Campbell county; "The County Judge—His Relation to the Road System of the County," by Judge W. G. Simmons, of Grant county; "The Pauper System and Super-

vision by Counties," by Judge J. M. Long, of McCracken county; "The County Judge's Relation to the War," by Judge D. W. Ridder of Hardin county; "The Objects and Aims of the County Judges' Association," by Judge Wallace Brown.

AMONG WOMEN LAWYERS.—Miss Helen D. McCormick of Brooklyn has been appointed assistant district attorney of Kings county, N. Y. She is the first woman prosecutor in New York city.—For the first time in the history of the Cook county, Illinois, courts a woman has been named master in chancery. Mrs. Catharine Waugh McCulloch, a leader in suffrage circles, received the honor recently at the hands of Judge Jacob H. Hopkins, on his installation in the Superior Court.—Miss Edith V. Phillips, editor of the California Law Review, issued by the law department of the University of California, is said to be the first woman to edit a law journal in any university in the United States.

## English Notes*

JUDICIAL APPOINTMENTS.—Arthur Clavell Salter, K. C., has been appointed a Justice of the High Court of Justice, King's Bench Division, in the place of the late Mr. Justice Low. Mr. Salter was called by the Middle Temple in 1885, and took silk in 1904. Alexander Adair Roche, K. C., has been appointed a Justice of the High Court of Justice, King's Bench Division, in the place of Mr. Justice Ridley, who has resigned. Mr. Roche was called by the Inner Temple in 1896, and took silk in 1912.

HOME RULE IN ENGLAND.—We are glad, says the *Saturday Review,* that Mr. Lloyd George has put it on record, in the most clear and emphatic manner, that seventy-five per cent of the armies of the Empire has been contributed by England. We do not quite understand whether the seven hundred thousand men contributed by the colonies form part of the remaining twenty-five per cent or not. Let us suppose they do not; and that this twenty-five per cent is distributed between Scotland, Ireland, and Wales. The point we make is that England, contributing seventy-five per cent of the burden of empire in men and money, has for the last ten years (some would say for the last thirty years) been ruled by Ireland, Scotland, and Wales. An American of some distinction related his impression of a visit to that committee of Law Lords technically known as the House of Lords. "I found on the Woolsack Lord Herschell, and the rest of the court composed of two Scotchmen (Lords Gordon and Watson) and two Irishmen (Lords Morris and Macnaghten)." Lord Macnaghten was, of course, a member of the English Bar; still England was in a minority, and the American lawyer's observation was: "The English are a patient people."

COMPULSORY VACCINATION IN IRELAND.—The Court of King's Bench (Ireland), consisting of the Lord Chief Justice, Mr. Justice Madden, and Mr. Justice Dodd, in the recent case of Clear *v.* Guardians of the Poor of the Mountmellick Union, made short work of a defense set up by a number of persons before the justices to a demand that they should have their children vaccinated. The Vaccination Act 1898 (61 & 62 Vict. c. 49), under which a parent or other person having the custody of a child may within a given period make a statutory declaration that he conscientiously believes that vaccination will be prejudicial to the child's health and thereby avoids having the child vaccinated, does not apply to Ireland, and, where demands are made, all sorts of defenses are sometimes set up. In the instant case the parents made a demand that the medical officer should give a guarantee that the lymph to be used in the operation was taken from a cow and was pure, and, failing to obtain this guarantee, they refused to submit their children to any operation. Before the justices the medical officer admitted that he was unable to guarantee the purity of the lymph. It was prepared in the laboratories of the Local Government Board, and it was from that department he received his supplies. He had always used it and found that it was successful. The defendants argued that they had reasonable grounds for refusing to comply with the law. The justices held that there were no grounds for refusing to carry out the law, and imposed a fine on all the defaulters, but stated a case for the opinion of the King's Bench Division. The court upheld the decision of the magistrates, and dismissed the appeal with costs.

COSTUMES AT THE BAR.—Among the minor changes which the war has brought in its train in connection with the administration of the law, and which the chronicler of such matters will not overlook, is the innovation in the matter of costume that is occasionally to be seen at the Bar. With so many juniors serving in his Majesty's forces, we have grown quite accustomed to see every now and again khaki in place of wig and gown in counsel's seat, and now it has been decreed both in the Chancery and King's Bench Divisions that the humbler, but nevertheless honorable, blue of the special constable shall be allowed the same privilege. We have, indeed, traveled a long way from the position taken up by that great stickler for propriety in professional costume, Mr. Justice Byles, who is reported to have addressed the late Lord Coleridge, then at the Bar, thus: "Mr. Coleridge, I never listen with any pleasure to the arguments of counsel whose legs are encased in light grey trousers." It would be interesting to know when precisely rigid propriety in the matter of professional costume, such as that craved by Mr. Justice Byles, first began to be insisted on by the general opinion of the Bench and Bar. Was there ever a time within the last century and a half or so when it was optional, for example, for a barrister to wear a wig or not as he pleased? It would not seem to have been obligatory at the Scots Bar less than 100 years ago, for in Cockburn's Life of Jeffrey we are told that throughout the last fifteen or twenty years before his accession to the Bench, which occurred in 1834, Jeffrey generally appeared at the Bar without a wig, which apparently he disliked exceedingly. In a letter written in 1824 from London, where he was attending the House of Lords as counsel in some Scottish appeals, he bemoans having to "sit six hours silent in a wig."

PROHIBITION AGAINST MINER POSSESSING LUCIFER MATCHES.—Throughout the continuance of the war, public indignation has again and again been aroused by the perusal of reports of cases in which lucifer matches for the lighting of pipes and cigarettes have been discovered to have been brought into munition factories by workers there, female as well as male. And it was not until a much severer penalty than a mere monetary fine was begun to be inflicted that anything like an efficient check was placed on this supremely dangerous practice. A decision like that in the recent case of Jones *v.* Lewis (117 L. T. Rep. 127) is rendered, therefore, of unusual interest at the present time. For not only into coal mines, but into those factories likewise, is it that lucifer matches must not be secretly conveyed. In that case, the provisions of section 35 of the Coal Mines Act 1911 (1 & 2 Geo. 5, c. 50) came before the Divisional Court, consisting of Lord Reading, C. J. and Justices Ridley and Rowlatt, for consideration. That section prohibits any person, whilst in any mine in which safety lamps are required to be used, from having in his pos-

*With credit to English Legal Periodicals.

session, among other articles, any lucifer match. If any person is found, on being searched, to have any of such articles in his possession, he is guilty of an offense against the Act. Persons are required to be searched after, or immediately before, entering the mine. And the omission to carry that requirement strictly into effect gave rise to the question that called for decision in the case now under comment. In the pocket of a coat which was hanging on a post in a mine and which belonged to a miner who worked there, but whose coat had not been properly searched before he entered the mine, was found a lucifer match. It was decided by the Divisional Court that as the provisions of section 35 of the Act absolutely prohibited any person in a mine having a lucifer match in his possession, it was immaterial, in case such possession was proved, whether there had or had not been a previous search of the person. But the learned judges had then to deal with the possibility of the lucifer match having been placed in the pocket of the coat by some other individual—a contingency which might occur to any workman whether in a mine or in a munition factory. And until that point had been determined—a task by no means free from difficulty it is easy to perceive—no conclusive decision could be arrived at by the court.

REPRISALS.—General Smuts, in his speech on October 4, as the guest of the Associated Chambers of Commerce, made a most important announcement of the intention of the Government, regard being had to the moonlight raids on London, to carry out air reprisals. No attempt to regulate or to legalize the practice of reprisals was made at either of the Hague Conferences of 1899 and 1907. Sir F. E. Smith, K. C., thus enunciates the position: "As no reference is made to reprisals in the Hague Conventions, we are thrown upon the general principle which applies to the whole of these regulations that 'in cases not included in the regulations, populations and belligerents remain under the protection or the rule of the principles of the law of nations as they result from usages established between civilized nations, from the laws of humanity, and the requirements of public conscience'." General Smuts' announcement is consonant with the principles of international law as expounded by the highest authorities on that subject. "We are anxious to avoid," he said, "further horrors to this war. But we are dealing with an enemy whose kultur has not carried him beyond the rudiments of the Mosaic law, and to whom you can only apply the maxim, 'An eye for an eye and a tooth for a tooth.' On that principle we are most reluctantly bound to apply to him the bombing policy he has applied to us. I am afraid that the Government has no longer any choice in the matter. . . . It has not been our doing, and the blame must rest on an enemy who apparently recognizes no laws, human or Divine." General Smuts in this statement of the policy of the Government which the savagery of the Germans has rendered absolutely necessary, reflects, albeit unconsciously, the well-considered judgments of two great international lawyers on reprisals. "Reprisals," writes Mr. Hall, "is a measure so repugnant to justice and, when hasty and excessive, so apt to increase rather than abate the irregularities of war that belligerents are universally bound not to resort to reprisals except under the pressure of absolute necessity, and then not by way of revenge, but only in cases and to the extent by which an enemy may be deterred from a repetition of the offense." Mr. Hannis Taylor, like General Smuts himself, refers to reprisals as considered in the light of the Sermon on the Mount. "The golden rule," he writes, "has little international application, for 'the whole international code,' observes Wharton, 'is founded on reciprocity.' If the enemy violates the established usages of war it may become the duty as well as the right of his adversary to retaliate in order to prevent further excesses on his part. In any event, retaliation should consist of the same or similar acts, and, as far as possible, it should be inflicted, not vicariously, but on the actual wrongdoer."

CONDONATION OF ADULTERY FRAUDULENTLY INDUCED.—Singular as it may appear, no authority was seemingly able to be cited in which the precise question that was raised before Mr. Justice Hill in the recent case of Roberts *v.* Roberts and Temple (117 L. T. Rep. 157) had ever been directly decided. Is condonation of adultery, induced by false and fraudulent statements—apparent forgiveness, in short, the misrepresentations having been made for the express purpose of obtaining that forgiveness—an answer to a petition for the dissolution of a marriage? In that case it was the wife who had made the false and fraudulent statements. She confessed to the husband that she had committed adultery with a certain individual. And, when pressed to inform the husband whether she was pregnant in consequence, she positively denied that she was so, although contrary to the fact. The husband was willing to forgive the wife the adultery to which she had confessed, only in case she was not with child as the result thereof. But, deluded by the wife's false assurances, the husband resumed marital relations with her. On ascertaining the true condition of affairs, the husband petitioned for a dissolution of the marriage. His petition was, however, met by the plea of condonation of the adultery of which the wife had been guilty. Nevertheless, Mr. Justice Hill held that the husband was entitled to have a decree nisi. At first sight, the tendency of most persons would, we surmise, be to regard the correctness of his Lordship's decision as somewhat open to doubt. But a closer examination of the considered judgment which was delivered by him will probably produce a complete change of view. For the reasons which he assigned for his decision are of so satisfying a character as to do much to dispel that doubt. The conclusion of law at which the learned judge arrived was that there was no real condonation. There was an appearance, but not the reality, of forgiveness. Condonation, his Lordship pointed out, is a question of fact. The mere admission by the petitioner of his having had intercourse with his delinquent wife after her confession of adultery was not accepted by the learned judge as a ground for dismissing the petition in pursuance of sect. 30 of the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85). To say that because the adultery complained of had been condoned, it was immaterial how the forgiveness was induced, did not commend itself to his Lordship as a sound proposition. It is true, as his Lordship said, that in Beeby *v.* Beeby (1 Hag. Ecc. 789) the presumption to the mind of Lord Howell was stated to be that a husband would not take his wife back to his bed unless he had forgiven her. "But if to an express forgiveness," rejoined Mr. Justice Hill, "it be an answer to say that it was obtained by fraud of one of the parties, that answer must equally be open to forgiveness implied from the fact of cohabitation." Inasmuch as without the fraud the condonation never would have been granted, the learned judge seems to have done no more than strict justice in disregarding that condonation altogether.

WHEN A LIQUID IS A "MINERAL."—A question of some novelty, and certainly one of some interest, as was remarked by Mr. Justice Lush at the beginning of his judgment in the recent case of Attorney-General *v.* Salt Union Limited (117 L. T. Rep. 140), was raised there. Indeed, in only one previous case does it appear that the question whether a liquid could be a "mineral" has ever directly arisen. That was the case of *Re* Lord Dudley's Settled Estates (26 Sol. Jour. 359), wherein it was held by Vice-Chancellor Hall that a certain proposed lease, so far as it dealt with brine water pumped up from the earth in order to obtain

salt by means of evaporation, did not fall within section 4, sub-section 3, of the Settled Estates Act 1877. In other words, the salt thus procured was held not to be "mineral" necessitating that a certain proportion of the rent or payment reserved by the lease should be set aside and invested so as to form part of the capital of the settled estate. In the present case, water in which rock salt was dissolved, the water having percolated to it through the soil, was brought from underground to the surface by means of brine pumpers through shafts and borings. Was the water thus impregnated with salt a "mineral" in respect to which "mineral rights duty" was required to be paid by section 20, sub-section 1, of the Finance (1909-10) Act 1910 (10 Edw. 7, c. 8)? On behalf of the Crown it was claimed that it was so. And Mr. Justice Lush upheld that claim. Various substances are expressly exempted by sub-section 5 of the same section from liability to payment of the duty. But salt is not one of them. And inasmuch as brine water is no more than salt in solution—and that by itself salt is a mineral is scarcely open to dispute—that goes far towards determining the question in favor of the Crown's contention. It is true that it is an undoubted principle that "the intention to impose a charge upon the subject must be shown by clear and unambiguous language." That was laid down in Commissioners of Inland Revenue *v.* George Angus and Co. Limited (61 L. T. Rep. 832; 23 Q. B. Div. 579); while in numerous other cases it has been stated that all taxing statutes must be construed with the utmost strictness. Nevertheless, a study of the reasoning on which Mr. Justice Lush proceeded in the present case impels one to the conviction that he arrived at the right conclusion in deciding as he did. For what could be more convincing than this observation? "If one takes," his Lordship asserted, "the word 'minerals' freed from any control and without reference to any necessary restricting operation, having regard to the object of the Legislature, the term is unquestionably wide enough to include not only those substances which will be minerals for the purposes of the Railways Clauses Consolidation Act 1845"—see North British Railway Company *v.* Budhill Coal and Sandstone Company (101 L. T. Rep. 609; (1910) A. C. 116)—"but practically, as was said in the case in the Scottish courts, Anstruther v. Commissioners of Inland Revenue (1912, S. C. 1165), all substances which can be obtained from the crust of the earth other than surface soil."

HOURS OF WORK IN THE HOUSE OF COMMONS. — The very strongly expressed desire for a return to the early practice of daylight sittings of the House of Commons, to which the recent air raids have largely contributed, may recall the fact that the meeting of the House of Commons, not in the morning, but in the afternoon, is one of the many illustrations of the effect on the customs, rules, practice, and etiquette of the House of Commons due to a large contingent of practising barristers being members of that assembly. The hours of work in the House of Commons have in the course of centuries undergone remarkable variations. Hooker reports that in the reign of Elizabeth the House met every day, and that its regular hours were from 8 a. m. till 11 a. m., the afternoon being devoted to committees. But, as time went on, the competition of the courts of law, which also met in the morning, rendered the postponement of the hours of meeting more and more urgent. It is often recorded that the Speaker sent the Serjeant-at-Arms to the various courts to call the numerous legal members of the House to their Parliamentary duties. In the reigns of Elizabeth and James I. the Serjeant-at-Arms was frequently directed to bring with him into the House lawyers whose professional engagements clashed with their obligations of service in Parliament. These orders to the Serjeant-at-Arms were frequent until the reign of George I., and they were issued as late as 1769. In 1657, on the occasion of a motion in a Cromwellian Parliament that the Serjeant-at-Arms go with the Mace into Westminster Hall to bring the lawyers into the House, it was proposed that the judges there should be required to sit at seven o'clock in the morning and to rise at ten to meet the convenience of members of the Bar who were of the House. "You will make yourselves very cheap," said a Mr. Bond who supported the motion, "to send your Mace every day out for your members. I would rather have you require your judges to sit at seven and rise at ten that all may attend, and if you take away the counsel wholly you will undo many a poor man who has retained them from the beginning in the causes." Against this proposal it was urged by Mr. Weaver that the House ought not to put the judges "to harder task than ourselves that are younger constitutions to sit at seven." That motion, like several motions that "the judges be moved to give precedence to all such lawyers as are members of this House," was not carried. Speaker Onslow remarked in 1759 that the beginning of the sittings had been shamefully postponed, and during the reign of George III. the working period of the House extended still further into the night to suit the convenience of a section of members largely consisting of practising barristers with whose professional work day sittings clashed. With, however, the development of Government by party new influences began to prevail which insured for the Administration a full attendance of its supporters on all critical occasions—an attendance which was rendered less irksome by the substitution of evening for morning sittings.

THE RIGHT OF THE GOVERNMENT TO OPEN PRIVATE LETTERS.—On October 29, in a discussion on the adjournment of the House of Commons, the right and duty, if occasion requires, of detaining and opening letters in the Post Office was maintained and defended by Sir George Cave, the Home Secretary, just as the same right and duty had been maintained and defended in 1881 by Sir William Harcourt, when Home Secretary, who, like Sir George Cave, admitted its exercise. "The question," said Sir George Cave, "whether the Home Secretary has the right to direct private letters to be opened as they go through the Post Office is a very old question indeed. The right was asserted a century ago, at the moment when the Post Office was first established, and it has been asserted over and over again. It was discussed in the Mazzini debates in 1844 and 1845." The right was exercised far more than a century ago under statutory authority. By an Act of the 9th of Anne the Secretary of State first received statutory power to issue warrants for the opening of letters, and in 1783 the Lord-Lieutenant of Ireland received the same power, and this authority has been continued by several later statutes for the regulation of the Post Office. It rests in Great Britain on the Home Secretary, and in Ireland on the Lord-Lieutenant (7 Will. 4 & 1 Vict. c. 36 extended to telegrams by 32 & 33 Vict. c. 73, s. 23). In the report of a committee of the House of Commons which sat to inquire into precedents for the action of Sir James Graham in 1844, when Home Secretary, in the opening of letters in the Post Office (Parliamentary Papers, 1844, xiv.) the whole history of the subject is set forth. It appears that foreign letters in early times had been constantly searched to detect correspondence with Rome and other foreign Powers, and that by orders of both Houses during the Long Parliament foreign vessels had been searched, and that Cromwell's Postage Act of 1657 expressly mentioned the opening of letters in order "to discover and prevent dangerous and veiled designs against the peace and welfare of the Commonwealth." Charles II. interdicted the opening of any letters except by warrant from the Secretary of State. In 1722, several letters of Bishop Atterbury having been opened, copies were produced in evidence against him on the Bill of

Pains and Penalties, while during the rebellion of 1745 and at other periods of public danger letters had been extensively opened. The name of the Marquis of Anglesey, who was Lord-Lieutenant of Ireland in 1828-1829 and again in 1830-1833, is the first on the list of Home Secretaries and Lords-Lieutenant under whose warrants letters have been opened which was laid before Parliament in 1844. Lord Anglesey opened O'Connell's letters in the Post Office as well as letters addressed to him. These letters were resealed with the utmost care with counterfeited seals, so that the persons receiving the letters should not suspect that they had been opened. A similar practice has been followed at present. "If," said Sir George Cave, "the moment you open one letter you indicate to the receiver that the correspondence is being watched, there is an end to the correspondence. You may, of course, lose the very purpose for which you are opening the letter." The committees appointed in the House of Lords and the House of Commons to investigate the law in regard to the opening of letters and the mode in which it was exercised entirely vindicated the personal conduct of Sir James Graham. No amendment of the law was recommended, and the Secretary of State, as we see, still retains his accustomed authority. "I have always," said Sir George Cave in the House of Commons recently, "made it my rule not to sign these warrants [for the opening of letters] without very good reason shown to me, and where good reason has been shown to me I have signed them, feeling that I was doing only what I was absolutely bound to do." In these words the Home Secretary echoed, albeit unconsciously, the well considered judgment of Sir Erskine May, writing as a constitutional lawyer and historian of the very highest eminence: "No one can doubt that this authority, if used at all, will be reserved for extreme occasions when the safety of the state demands the utmost vigilance of its guardians."

## Obiter Dicta

UNFILIAL.—Young *v.* Older, 183 Ind. 646.

OUT OF TUNE.—Cornet *v.* Cornet, 269 Mo. 298.

SWEET *v.* SOUR.—Manlove *v.* Lemmon, 272 Ill. 120.

REQUIESCAT IN PACE—NOT.—Peace *v.* Edwards, 170 N. Car. 64, was an action to set aside the will of Josephus Peace.

CAUSA CAUSANS.—"A child was born as a result of the union occasioned by the marriage ceremony." See Peerless Pacific Co. *v.* Burckhard, 90 Wash. 221.

KEEPING UP THE FIGHT.—Fite *v.* Fite, 110 Ky. 197, was a proceeding in contempt to enforce the payment of alimony previously adjudged in an action for divorce.

DELAWARE CHARTERS
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TO THE DELAWARE LAW (March 20, 1917).
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WITHOUT WEIGHT.—"It must be conceded that whether one is or is not a church member ought not to be used as a make-weight in a judicial investigation." See State *v.* Asbury, 172 Iowa 612.

NEW YORK HAS NOTHING ON VERMONT.—"The word 'evening' in this locality means, probably, from the usual supper-time to the usual bed-time, and these limits are somewhat indefinite." Per Haselton, J., in State *v.* Foley, 89 Vt. 195.

HUMAN BEINGS ONLY.—The headnote to Jones *v.* Smart, 1 T. R. (Eng. 45), says: "A diploma conferring the degree of Doctor of Physic, granted by either of the universities in Scotland, does not give a qualification to kill game."

HISTORY REPEATS ITSELF.—"Though we were in peace, the war had commenced in Europe. We wished to have nothing to do with the war; but the war would have something to do with us." Per Ellsworth, C. J., in Williams' Case, (1799) 29 Fed. Cas. No. 17,708.

NOTHING NEW UNDER THE SUN.—In State *v.* Norris, 2 N. Car. 429, the court said: "The people in this country do not take for truth everything that is published in a newspaper." Which goes to show that the yellow journal is at least one hundred and twenty years old.

GUESS!—We notice in the *Harvard Law Review* for December the card of a woman who styles herself "A. Darling" and advertises herself as a stenographer, with an office at Harvard Square, Cambridge. Three guesses as to who does the stenographic work for the *Review!*

VERY BUSY ON THE 2D.—"In a case, of Rex (Peters and others) *v.* Cosgrave, the Court of King's Bench, consisting of the Lord Chief Justice and Mr. Justice Dodd, decided a question of considerable practical importance upon the duties of an auditor on the 2d inst." Law Times, Nov. 10, 1917.

THE OLDEST CONFIDENCE GAME IN THE WORLD.—In People *v.* Miller, 278 Ill. 440, it was held that the conduct of a woman in obtaining money from a man for the purchase of diamond rings and the like, under a promise of marriage which she had no intention of fulfilling, constituted a "confidence game."

ACCORDING TO HOYLE.—In Hughes on Admiralty, at page 257, the author, speaking of the "special circumstance" rule of navigation, observes: "He who disregards the regular rules, and appeals to this one, shoulders a heavy burden. He is like the whist player who fails to return his partner's trump lead. He may be able to justify it, but explanations are certainly in order."

THE GOLDEN RULE MAKES TROUBLE.—In Golden Rule *v.* B. V. D. Co., 242 Fed. 929, the appellant forgot itself and used some of the copyrighted matter of the appellee without permission. The B. V. D. may be a protector of persons but it is no respecter thereof and refused to apply the Golden Rule to the Golden Rule. The result was that the Golden Rule was haled into court and punished for infringing itself.

THE DISSENT COURTEOUS.—We have often commented on the vigor, to employ a euphemism, with which dissenting judges in this country combat the views of their brethren in the majority. How much better would it be to adopt the English style, the following illustration of which we are pleased to give: "I have the misfortune to differ from Lord Justice Cotton, and I do so with a deep sense of the probability that he is right." Per Bowen, L. J., in the case of *In re* Haseldine, 31 Ch. D. 511.

THE ORIGIN OF THE PHRASE "PHILADELPHIA LAWYER"?—"A complete knowledge of the laws cannot be expected in every

corner of our country; but this much we may say, to remove this kind of an excuse. If a man does not know when a law is passed, he knows how to obtain that information, and the law itself; for if he cannot come to Philadelphia, or some other town where they may be purchased by himself, he has opportunity of sending from time to time."—See Case of Fries, 9 Fed. Cas. p. 915, decided in 1799.

A FEW LABELS.—The habit which publishers of law digests and encyclopedias have acquired of placing on the back of each volume a label indicating the first and last subject treated therein leads oftentimes to amusing collocations of titles. We append a few examples, recently noted, with the headline suggested by each:

*Spending the Surplus.*
"Annuities to Automobiles"—vol. 2 R. C. L.

*Lovers' Lanes.*
"Highways to Husband and Wife"—vol. 13 R. C. L.

*Putting It Out of Business.*
"Chloroform to Constitutional Law"—vol. 6 A. & E. Encyc. Law (2d Ed.)

*Where They Usually Go.*
"Private Roads to Receivers"—vol. 23 A. & E. Encyc. Law (2d Ed.)

*Cutting it Down.*
"Rape to Salary"—vol. 42 Century Digest.

*We Have None.*
"Malice to Money"—vol. 18 R. C. L.

*A Logical Step.*
"Sales to Shipment"—vol. 35 Cyc.

*Another Logical Step.*
"Homicide to Imprisonment"—vol. 26 Century Digest.

*Quite Necessary.*
"Parties to Plead"—vol. 30 Cyc.

*Santa Claus.*
"Way to Younger Children"—vol. 15 Mew's Eng. Digest.

*Revolutionary.*
"Crown to Election"—vol. 5 Mew's Eng. Digest.

*Blowing Up One's Brother.*
"Explosions to Fratricide"—vol. 19 Cyc.

Can any of our readers add to the collection?

# Correspondence

### INJURIES TO THE "HIRED GIRL."

*To the Editor of* LAW NOTES.

SIR: The statement by W. A. S. in the "Hired Girl" article in the November issue that it is "remarkable that the ancient jest concerning the servant who lit the fire with kerosene is wholly without a foundation in judicial history," was, no doubt, true when written. Now, however, we have a case in point in Kolaszynski *v.* Klie, 102 Atl. 5, with wood alcohol substituted for kerosene.

H. M. BOSS, JR.

Providence, R. I.

### MILITARY SERVICE AS EDUCATION.

*To the Editor of* LAW NOTES.

SIR: Apropos of your editorial in the November number of LAW NOTES on "Military Service as Education," I send you, as confirmatory of your view and that of Mr. Charles Francis Adams, the following extract from an address of Prof. Milton W. Humphreys of the University of Virginia, at the celebration of the Lee Centennial, Jan. 19, 1907. It must be premised that at the time referred to by Prof. Humphreys, General Robert E. Lee was President of Washington College at Lexington, Va., and Prof. Humphreys was a student in that institution. The extract is as follows:

"Just once it was my lot to receive a severe rebuke from General Lee. While I was an undergraduate my health seemed to become impaired, and he had a conversation with me about it, in which he expressed the opinion that I was working too hard. I replied: 'I am so impatient to make up the time I lost in the army—' I got no further. General Lee flushed, and exclaimed in an almost angry tone: 'Mr. Humphreys! However long you live and whatever you accomplish, you will find that the time you spent in the Confederate army was the most profitably spent portion of your life. Never again speak of having lost time in the army.' And I never again did."

CHARLES A. GRAVES.

University of Virginia.

### THE NECESSITY OF CONSTITUTIONAL LIMITATIONS.

*To the Editor of* LAW NOTES.

SIR: In your leading editorial on page 141 of LAW NOTES for November, 1917, you say:

> "If every constitutional limitation in the United States was repealed tomorrow, we should no more lose our liberties than the English and the Canadians have done."

Your teachings, and the teachings of other law writers, apparently with the view to the subversion of the constitutional rights of the American people, have had a deplorable effect upon the minds even of capable lawyers, because, owing to the present excited condition of the minds of the people, very few of them have the capacity to make an accurate analysis of the arguments indulged in.

Your illustration of "the condition of states which have no written constitution," is utterly worthless in support of your argument. While England and Canada have no written constitutions, their government is *purely parliamentary,* and the executive officers appointed by the parliament may be turned out at any moment. Under our constitution there are three co-ordinate departments of the government, each supreme within its sphere, namely, the executive, the legislative, and the judicial. The President is elected for a *fixed term* of four years, and is clothed with vast powers. Congress also has great powers, and the judicial department has reserved to it important powers.

With the *fixed term* of our executive, it is hard to conceive how any one can suppose that if the executive exercises absolute dictatorial powers without regard to constitutional limitations, the liberties of the American people would not thereby be greatly endangered.

The people of Great Britain and of Canada occupy an altogether different position from that in which we would stand with the autocratic powers of the British and Canadian cabinets arbitrarily exercised by our executive. The British and Canadian autocrats may be removed from office at any moment, while our autocrat would be in office for a fixed term.

LEON F. MOSS.

Los Angeles, Cal.

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# Law Notes

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## SEYMOUR W. WHITING.

THE first of the eight members of the editorial staff whose stars honor the service flag of the Edward Thompson Company has given his life for his country. Seymour W. Whiting, who served the Company most admirably in an editorial capacity for nearly two years, died at Douglas, Arizona, of pneumonia, on New Year's Day. Few men deserve more honorable mention. After the United States entered the war, Mr. Whiting, determined to do his bit, applied for admission to one branch of the service after another, only to be rejected for physical disability. Nothing daunted, he finally enlisted in the North Carolina National Guard and won his commission as second lieutenant in the 11th Field Artillery not long before his death. He never fought in the trenches, but none the less when the final call came to him to go "over the top" he went in the service of his country.

### The Conscription Law Sustained.

THE assertion that the selective draft law is unconstitutional has been well understood by every competent lawyer to be the veriest pretense; a pretense inspired in the most part by cowardice or treason. As Lincoln wrote with reference to the Civil War draft:

"In this case, those who desire the rebellion to succeed, and others who seek reward in a different way, are very active in accommodating us with this class of arguments. They tell us the law is unconstitutional. It is the first instance, I believe, in which the power of Congress to do a thing has ever been questioned in a case when the power is given by the Constitution in express terms."

The pretense has now been brushed aside by the unanimous decision of the Supreme Court, in an opinion in which the several objections urged against the act were characterized by the Chief Justice as "absolutely without merit."

Regarding the contention that Congress has no power to exact enforced military duty by the citizen the decision says:

"This but challenges the existence of all power, for governmental power which has no sanction to it and which can only be exercised provided the citizen consents is in no substantial sense such a power. It is argued, however, that, although this is abstractly true, it is not concretely so because, as compelled military service is repugnant to a free Government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence, counting alone upon the willingness of the citizen to do his duty in time of public need—that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion."

### The Effect of the Decision.

THE authoritative pronouncement on the validity of the conscription law should have the effect of putting a quietus on all obstructive agitation. It will at least remove the last obstacle to the taking of effective measures against future agitators. Attorney General Gregory in a recent address clearly defined the issues and gave plain warning to the seditious. He said:

"There is no ground for a neutral to stand on now. The time has come as the prophet said, 'Choose ye this day between God and Baal.' Choose ye this day between Woodrow Wilson and William Hohenzollern. Choose ye this day between America and all it stands for and Germany and all it stands for.

"Ninety-five per cent of the men of America will give their lives as freely in 1917 for the liberties we enjoy as did the patriots in 1776. Ninety-five per cent of the women are willing to wind their hair into bowstrings to fight their country's battles.

"I am not speaking to the other 5 per cent of disloyal citizens and moral and physical degenerates who believe that nothing is worth fighting for. To him who desires to retard the successful prosecution of this war I sound this note of warning—lock that thought in your heart and throw away the key.

"The disloyal citizen shall not discourage or stab in the back the men who fight for his liberties as well as their own. To all such, a message will be delivered before the criminal courts and juries of our country."

The alternative is not between vigorous prosecution and continued sedition. It is between vigorous prosecution and the drastic measures to which an indignant people will be driven if it is not forthcoming.

### Another Slacker Scored.

IN sustaining the expulsion from Columbia University of a student who publicly counseled resistance to the conscription law and declared his hatred of the "American

Kaiser," Justice Mullan in *Samson* v. *Trustees*, 167 N. Y. Supp. 202, said that the petitioner was thereby shown to be "morally unfit" to be continued a member of the student body and "a blot on the good name of the famous and honored university whose degree he seeks." It has been said by an eminent physician that the seditious pacifist is a mental pervert, so it is perhaps too much to hope that any appreciation of the true nature of their conduct will find its way into the darkened minds of those who are seeking to weaken the arm raised for the defense of the nation. But the wise and patriotic words of our judges should admonish their fellow citizens that the enemy within our gates deserves as little consideration as the braver enemy across the sea. As was said by Justice Mullan in conclusion: "We are a tolerant people, not easily stirred, prone to an easy-going indulgence to those who are opposed to the very essentials and vitals of our organized social life; but there must of necessity be a limit somewhere to the forbearance that can with safety be extended to the forces of destruction that hide behind the dishonestly assumed mask of the constitutional right of free speech. To attempt to state in general terms the difference between an honest and a dishonest exercise of the wholesome right of free speech that our Constitution so completely and properly protects would be as vain as it would be unprofitable here. In some cases, in many cases perhaps, reasonable men would differ. But in some cases reasonable men could not differ, and I think we are dealing with such a case here. To counsel resistance to the draft ordained by lawful authority in accordance with our form of government is as culpable as it is cowardly; and one who does so is doing the work of the enemy without—thus far, at least—incurring the risks and braving the dangers that are the accepted lot of an enemy who is recognized as such because he has the courage openly to avow his true allegiance."

#### Treason.

IT is well settled that the levying of war on the United States, as that term is used in the constitutional definition of treason, includes not only the levy of war for the purpose of overthrowing the government, but the assemblage of men for the purpose of forcible resistance to the execution of any law of the United States. See the article on "The Law of Treason" in last month's LAW NOTES. An application of that rule which is of peculiar timeliness is to be found in the case of *Druecker* v. *Salmon*, 21 Wis. 628. In that case it appeared that Druecker was one of a mob which on the 10th of November, 1863, paraded the streets of Port Washington, Wis., carrying a flag bearing the words "No Draft." On the arrival of the draft commissioner, he was, by these worthy sires of La Follette's constituents, assaulted and driven from the town. Passing on this transaction the court said: "Levying war against the United States is the highest crime known to the laws of the land. That term, as used in our Constitution, is borrowed from the statute of the 25th Edward III, and long before it was used in our laws had a fixed and definite meaning. Mr. Justice Curtis says: 'The settled interpretation is that the words "levying war" include not only the act of making war for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law, in pursuance of such combination. The following elements therefore constitute this offense: 1st. A combination or conspiracy, by which different individuals are united in one common purpose. 2d. This purpose being to prevent the execution of some public law of the United States by force. 3d. The actual use of force by such combination, to prevent the execution of such law.' . . . Although there must be force used, it is not necessary that there should be any military array or weapons. The crime may be committed by those not personally present at the immediate scene of violence, if they are leagued with the conspirators, and perform any part, however minute. The evidence, therefore, tends to prove that there was an insurrection at Port Washington, and that those engaged in it committed the crime of treason."

#### Anti-strike Legislation.

THE assumption by the federal government of control of the railroads will bring up many and perplexing legal problems, not the least of which is that of the adjustment of labor disputes. Thus far the patriotism of the employees has prevented any serious interference with transportation, but some definite machinery for the adjustment of differences should certainly be provided, and a recollection of the circumstances which gave rise to the Adamson law cannot but arouse a hope that some method may be found to prevent their recurrence. There would seem to be no insurmountable constitutional obstacle to such a law. The right of individuals to quit work cannot of course be denied, but the courts have in the past found no difficulty in holding that the right to quit work is not so absolute that it can be exercised in concert at all times and for all motives. It must always be borne in mind that a strike is not in any real or honest sense the leaving of an employment. The status of strikers with respect to their employer was very aptly stated by Judge Grosscup in *Iron Moulders Union* v. *Allis-Chalmers Co.*, 166 Fed. 45, as follows: "A strike is a cessation of work by employees in an effort to get for the employees more desirable terms. A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms. Neither strike nor lockout completely terminates, when this is its purpose, the relationship between the parties. The employees who remain to take part in the strike or weather the lockout do so that they may be ready to go to work again on terms to which they shall agree—the employer remaining ready to take them back on terms to which he shall agree. Manifestly, then, pending a strike or a lockout, and as to those who have not finally and in good faith abandoned it, a relationship exists between employer and employee that is neither that of the general relation of employer and employee, nor again that of employer looking among strangers for employees, or employees seeking from strangers employment." It certainly should be that the initiation of any such anomalous relation can be regulated when the effect thereof is to tie up a national industry and jeopardize the interests of millions of people. There is nothing peculiarly sacred about the right to work, which paralyzes the arm of the nation. The professional classes have long been subject to the most stringent regulations

as to the circumstances under which they can work and the rules by which that work must be carried on. The lawyer who walked out of court in the middle of a trial because his client refused to increase the fee previously agreed on would probably be afforded leisure and perchance solitude in which to meditate on the fact that no man has a right to jeopardize the public welfare to promote his selfish interests. On just what basis the manual worker claims the possession of a higher right is difficult to understand, and it will doubtless be somewhat difficult to convince a court that such a right exists.

**Judicial Tenure.**

IT has long been a debatable question whether a short term or a life tenure secures the largest measure of judicial efficiency. On the one hand it is argued that a short term is essential to give an opportunity to retire from the bench those judges who prove unfitted for judicial duties. On behalf of a life tenure it is urged that only by complete freedom from political influences can judicial independence be secured and judicial position be made attractive to the men best fitted for it. It has been suggested with much force that the solution lies in a compromise between the two conflicting views; that judges should be elected for a short term, say four years, and if re-elected at the end of that time should hold for life. Certainly any judge whom the people are willing to reelect after four years' service would continue to render as good if not better service for the remainder of his life. It seems equally clear that the election of a judge for life is so serious a matter that some substantial opportunity to ascertain his fitness should precede it. The life tenure is universally admitted to present many advantages, and the idea of a precedent "test term" appears to be an effective answer to the objections commonly urged.

**Superannuation of Federal Judges.**

AN article in LAW NOTES for March, 1917, discussed at length the validity and policy of the proposed act whereby any federal judge who does not take advantage of the retirement act on reaching the age of seventy years shall be superseded by the appointment of another judge to take precedence over him in the district. Renewed attention is directed to the subject by a recommendation of such a measure in the annual report of Attorney General Gregory. Cases may well be imagined in which such a provision would be effective to correct a most unsatisfactory state of affairs in a particular district. Conceivably, an actual case was in the mind of the Attorney General. But regarded as a general measure, it has the fault of fixing an arbitrary dead line where nature has fixed none. While mental powers remain unimpaired, every year of experience adds to a judge's capacity, and the instances cited in the article heretofore referred to show that no conclusive presumption of incapacity at the age of seventy can obtain. If there is an occasional instance of a judge stubbornly unconvinced of his own senility, a discretionary power reposed in the Circuit Justice to appoint a substitute would suffice, without making a general rule which may impose the humiliation of a forced retirement on a judge to whom the snowy locks of age have but brought increase of wisdom and benignity.

**Dissenting Opinions.**

THE fact that two recent important decisions of the federal Supreme Court have been unanimous (the conscription law case and the Louisville segregation ordinance case) arouses some interest in the extent to which the pronouncements of that court meet with the approval of all the justices. Of the seventy-one cases in 244 U. S. Rep. in which opinions were written, forty-nine were by a unanimous court, while in twenty-two, or thirty per cent of the total, one or more justices dissented—in four cases one justice, in nine cases two, in six cases three, and in three cases four. Comparing this volume with an earlier one taken at random, we find that 100 U. S. Rep. (1879) contains eighty-three cases, in twelve of which, or less than fifteen per cent, there were dissents. The disparity is not due to the formal character of the questions presented in the earlier volume, which contains a number of cases arising out of the Civil War, including *Dow* v. *Johnson* and *Tennessee* v. *Davis*. Students will naturally differ as to the inference to be drawn from the recent increase in the number of dissents. It may be suggested as not the least of the causes thereof that the present judicial epoch is more than important—it is one of peculiar transition and expansion. The legislation currently presented to the court would have been regarded as revolutionary to the last degree a generation ago. And, confuting the critics who regard the courts as a barrier to progress, the court has grown with the growing times. It has approached progressive legislation in no reactionary spirit, and in the main has declared it to be consistent with the Constitution. It is impossible that such a result could be reached without many differences of opinion. In such an era as that through which we are passing a court whose members were in perpetual accord would be a dead court, an echo of the past. In all the realms of evolution progress results from the interaction of diversities, and the evolution of law is no exception.

**Sic Transit Gloria Mundi.**

IN *Stertz* v. *Industrial Ins. Com.*, 91 Wash. 588, it was said, referring to the considerations leading to the adoption of the Workmen's Compensation Acts: "Both economists and progressive jurists were pointing out what is now generally conceded that two generations ought never to have suffered from the baleful judgments of Abinger and Shaw." Law is, in the last analysis, the expression of the best ideals of justice and equity which have found general acceptance. However carefully its expounders may formulate their judgments, a succeeding generation, animated by a higher idealism, will pronounce them archaic. The fame of the jurist fades as one by one the structures which he shaped fall before a higher concept of justice. As was eloquently said in an obituary address delivered forty-five years ago (39 Conn. 615): "The truth is, we are like the little insects that in the unseen depths of the ocean lay the coral foundations of uprising islands. In the end come the solid land, the olive and the vine, the habitations of man, the arts and industries of life, the havens of the sea and ships riding at anchor. But the busy toilers which laid the beams of a continent in a dreary waste are entombed in their work and forgotten in their tombs."

**Hostility to Lawyers.**

THE members of the legal profession may well love it for the enemies it has made. The ignorant have at all times been loud in their denunciation. One of the chief demands of the Peasants' Rebellion in the fourteenth century was the prompt execution of all the lawyers. A recent instance shows a similar point of view on the part of the great apostle of absolutism. Mr. Gerard relates that in a conversation with the Emperor of Germany the "All Highest" said: "Lloyd George, Asquith, Poincare, all my enemies—what are they. Pooh!—nothing but lawyers." Those who seek to set their own will above the law, be they rioters or tyrants, are always ready in their abuse of its expounders. The errors of the profession are heralded and its triumphs for the cause of civilization are forgotten. "The world accepts the work, but forgets the workers. The waste hours of Lord Bacon and Serjeant Talfourd were devoted to letters, and each is infinitely better remembered for his mere literary diversions than for his whole long and laborious professional life-work. The cheap caricatures of Dickens on the profession will outlive in the popular memory the judgments of Chief Justice Marshall, for the latter were not clownish burlesques, but only masterpieces of reason and jurisprudence. The victory gained by the counsel of the seven bishops was worth infinitely more to the people of England than all the triumps of the Crimean War. But one Lord Cardigan led a foolishly brilliant charge against a Russian battery at Balaklava, and became immortal. Who led the great charge of the seven great confessors of the English church against the English crown at Westminster Hall? You must go to your books to answer." (39 Conn. 615.)

**The Sorrows of Portia.**

AFTER much toil and tribulation the members of the fair sex have established generally the right to admission to the bar. Now they are busy in discovering new ways to lose it. A recent case is reported in the press of a New York woman lawyer, who having married an alien is confronted with a motion by the Attorney General to strike her name from the roll. The motion seems to be well founded in law. American citizenship is assuredly requisite to the right to practice, and it has been recently established by an authoritative decision that an American born woman by marriage with an alien loses her citizenship. *McKenzie* v. *Hare,* 239 U. S. 299, Ann. Cas. 1916E 645. There is no particular hardship in the individual case, for a lawyer who was ignorant of that important decision would be an unsafe counselor. And outside the ranks of the extreme feminists no fault can be found with the rule of law. It is unthinkable that husband and wife should bear diverse allegiance; should become alien enemies in the event of war. And since the citizenship of one must of necessity control, it should of course be that of the spouse who is liable to military duty. Besides, why should an American woman want to marry an alien anyway?

**The Prohibition Amendment.**

THE prohibition amendment recently submitted to the states by Congress contains a unique departure from precedent in its second section, which provides: "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." Hitherto a strict line of demarcation has been preserved between the powers of Congress and those of the states, and amendments like the thirteenth abolishing slavery and the fifteenth securing civil rights conferred on Congress the sole power of enforcement. It has been argued with some plausibility that since it is impossible that the state and congressional legislation to enforce the amendment shall be uniform, and since there can be no precedence between the statutes of legislatures given "concurrent jurisdiction," inconsistent regulations will nullify each other. This would seem to be a non sequitur. Concurrent jurisdiction as between a state and a municipality is familiar to our jurisprudence. A municipal ordinance and a state statute may cover the same general ground, and in many cases it has been held that one may add requirements not found in the other. See *Chicago* v. *Union Ice Cream Mfg. Co.,* Ann. Cas. 1912D 675 and note. A conviction under one is not a bar to a prosecution under the other. *Mayhew* v. *Eugene,* Ann. Cas. 1912C 37 and note. Very similar and even more simple would be the situation under the proposed amendment. If the state and the congressional regulations coincide, a prosecution may be had under either or both. If they are in conflict, a prosecution may be had under the one which has been violated, without regard to the lawfulness of the act in question under the other. The purpose of the unusual jurisdictional clause probably is to relieve the federal courts as far as possible of the trial of petty liquor cases and yet give a federal power to enforce the amendment in states which, having had prohibition thrust on them, will do nothing to further it.

**Parole Laws.**

CONSIDERABLE dissatisfaction has been manifested recently in Illinois with the operation of the parole laws of that state. State's Attorney Hoyne of Cook county advocates the unconditional repeal of the act on the ground that its only actual result is to release hardened criminals. Judges of the criminal court of Cook county have been conferring on the question and are represented as largely sharing Mr. Hoyne's view. Some of them are reported as saying that under the parole act criminals are being returned to Chicago to prey upon the community faster than the slow mills of the law can grind out convictions for serious crimes. A prominent Chicago clergyman is reported as espousing the same view, urging that the law should be executed "coldly and precisely" for the "general moral effect which such relentless punishment would have." The press report does not give the passage in the New Testament on which the sermon was founded. There is much to be said in support of the opposition to parole laws. The punitive feature of the criminal laws may be so emasculated that the law is wholly without efficacy for the protection of life or property. Particularly in a great city of diverse population a lax administration of the law operates as a continual incentive to crime and sets at naught the best intentioned efforts at reformation of the criminally inclined.

**The Contrary View.**

THERE is of course another point of view from which any measure so drastic as the repeal of the parole

laws is to be deprecated. It is well illustrated in an incident related of Judge Lindsey, who, in answer to a citizen protesting against the parole of a boy who had stolen the citizen's bicycle, said: "The trouble is that you are thinking of the bicycle while I am thinking of the boy." From that standpoint, to grant that some crime is committed by paroled convicts does not conclude the question. If a considerable number of criminals are more effectually reformed by parole than by the rigid enforcement of the sentence, the law is a good one though certain others break their paroles, just because human character is a more valuable thing than human possessions. Judged by that standard it is believed that parole laws almost invariably justify themselves. Where they do not, the fault is usually due to their administration. That view was well pointed out recently by a Chicago journal, which said editorially:

"If the situation is as bad as this, the judges and the state's attorneys of Illinois are doing their plain duty in arousing the lawmakers and the public to the evil effects of the parole system. It cannot be pointed out too often, however, that the trouble is not so much—if at all—in the parole law as it is in the way the law is administered.

"The purpose of the law is to give convicts who truly desire to live honest lives opportunity to return to the paths of productive industry and good citizenship. No law executes itself. The parole act is administered by a board of three members, appointees of the governor of Illinois. If numerous unreformed convicts are released by the board the responsibility rests on the personnel of that body. The plea of 'mistake' cannot be accepted. The board is supposed to make thorough investigation of the cases that come before it and to accord the benefit of the parole system only to those who have deserved it by good conduct and who give every promise of proving themselves useful free members of society. Is the board equal to its responsibilities and duties? If it is not, its present membership should be changed for the better without delay."

## HANDWRITING EXPERT VS. EYEWITNESS.

THE earlier handwriting experts naturally met in the courts the unbelief always accorded to the exponents of a new science. Their evidence was said to be "much too loose and unsatisfactory to lay the foundation for a judicial decision" (*People* v. *Spooner,* 1 Denio 343); "so weak and decrepit as scarcely to deserve a place in our jurisprudence" (*Cowan* v. *Beale,* 1 McArthur 271). In a yet earlier case, *Young* v. *Brown,* 1 Hagg. Ecc. 556, Sir John Nicholl referred to "that weakest and most deceptive of all evidence, dissimilitude of handwriting." So in the Tracy Peerage Case, 10 Cl. & F. 154, Lord Campbell said: "There was a witness (Sir Frederick Madden) who undertook to say that it was in the writing of about the middle of the last century. I do not mean to throw any reflection on Sir Frederick Madden. I dare say he is a very respectable gentleman and did not mean to give any evidence that was untrue, but really this confirms the opinion I have entertained that hardly any weight is to be given to the evidence of what are called scientific witnesses." In the Taylor Will Case, 10 Abb. Pr. (N. S.) 300, the Surrogate scouted the existence of a science of handwriting comparison, saying: "What does the expert in handwriting profess to do? He has no scientific basis of education, experience, or laws to build on. As in this case, he simply compares one signature with others, and notes some differences, the causes of which he does not attempt to explain, and which from his point of view are entirely unimportant in arriving at the conclusion that the same hand which wrote the signature to the will did not write the other five signatures. He is entirely ignorant how, when, and where those signatures were written; the mental, nervous, or physical condition of the writer; or of any of the influences which practical common sense teaches have an effect on handwriting. The mental and material influences are unknown to him. In fine, the writer was to him a stranger. It appears by the evidence of one of the experts, in reply to a question from the court, that the signature to the will is written on a blue-ruled line, while in the cases of four of the exhibits the signatures are written on unruled paper. How is it possible for them to tell the influence upon a man, with whom they were unacquainted, of being obliged to write his signature on a ruled line, when he may have been accustomed to write on unruled paper, as to its effect upon either rapidity or steadiness of motion? This is one of the many little but important material circumstances which concur to affect the handwriting, and which may be in itself sufficient to destroy all the theories of experts."

In the earlier cases in which an expert had the temerity to testify in opposition to an alleged eyewitness to the disputed writing, his testimony was ordinarily given scant consideration. Thus in *Bell* v. *Norwood,* 7 La. 95, it was held that the testimony of a witness that he saw an instrument signed outweighed the opinions of two persons that the signature was not genuine. In *Borland* v. *Walrath,* 33 Ia. 130, the court said: "The evidence as to the genuineness of the signature, based upon the comparison of handwriting and of the opinion of experts, is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence, or of the most unsatisfactory character. It cannot be claimed that it ought to overthrow positive and direct evidence of credible witnesses who testify from their personal knowledge." See to the same effect *Whitaker* v. *Parker,* 42 Iowa 386. In *Sarvent* v. *Hesdra,* 5 Redf. (N. Y.) 47, the Surrogate said: "It seems to me, notwithstanding the argument of the learned counsel for the contestant in this case, that expert testimony as to handwriting, as applied to this case, is especially open to criticism. The opinion of a medical expert may be tested by the standard authorities of medicine; the chemical expert may be required to make his experiment upon which he bases his conclusions before the court; and there is some standard by which to test, not only the capacity of the expert, but the soundness of his opinion. What is there to test the soundness of the expert's opinion in this case that the handwriting of the body of the will propounded is the same as that of the signatures of Canfield, Hesdra, and Stephens, without the means of testing the theory of those experts, that the signature of Mr. Canfield to the will was simulated by long trial of the writer, and that that of the decedent was traced over a genuine signature of the decedent? It seems to me that, in such a case, parties are substantially at the mercy of experts, if their testimony and theories are to be recognized as evidence, upon which the positive testimony of the person who made

his own signature and saw the others made, is to be overcome." In *Best* v. *Spooner,* 8 Ky. L. Rep. 185, the testimony of experts that the date of an instrument had been altered was held to be insufficient to overcome the testimony of an alleged eyewitness to its execution.

Not a little of judicial scepticism has been caused by a tendency of handwriting experts toward undue and dogmatic positiveness. A number of glaring errors made by experts professing that handwriting was an exact science were collated in an article in LAW NOTES for February, 1900. So in *People* v. *Waldo,* 148 N. Y. S. 986, the court refused to discredit the denial of a policeman that he had written a certain letter though a handwriting expert who "stands high in his calling and is a frequent witness" testified that from a comparison of handwritings he had reached "an irresistible conclusion" that the writing was that of the accused officer.

But gradually the judges, who had already verified in long experience with eyewitnesses the words of the wise man of Israel, "The simple believeth every word but the prudent man looketh well to his going," (Proverbs XIV, 15) began to recognize that in the science of the handwriting expert there was an instrument which might expose the perjurer and confound the plotter of iniquity. Through that science the forger working in the supposed secrecy of his curtained chamber has learned that, in the words of Epicharmus, "Mind sees and mind hears; all things else are deaf and blind." As was said in the Burtis Will Case, 43 Misc. (N. Y.) 437: "Of course, in cases where the handwriting or signature of a person, since deceased, is attacked as a forgery, the party defending it is apt to ridicule the value of expert evidence, because, almost invariably, evidence of this character is the only kind available to the party attacking the signature. He often has no other means at hand to show to the court or jury that the signature may be or is a forgery; while on the other hand the party defending the signature usually has the aid of one or more witnesses to testify to the fact of the signing, etc. If the court were to adopt the view that expert evidence is of little value and disregard it, the party attacking the signature ordinarily would have but little chance of success, and it would create unlimited opportunities for designing persons to forge the name of deceased persons to important documents and then swear it through." In *Frank* v. *Chemical Nat. Bank,* 5 Jones & S. (N. Y.) 26, the court said: "In addition there was the testimony of the expert, Mr. Payne, which it is impossible to carefully examine without being impressed by the extent, the minuteness, and the relevancy of his illustrations, and the force of his opinions and conclusions. They seem to indicate that skill, and the resources of science, are destined to discover forgery, with a certainty but little short of a mathematical demonstration."

From this recognition of the possibilities of an expert examination has grown up what may now be regarded as the prevailing rule, that the testimony of a handwriting expert will be given weight according to the reasons which he adduces in support of it. As was said in Gordon's Case, 50 N. J. Eq. 397: "Handwriting is an art concerning which correctness of opinion is susceptible of demonstration, and I am fully convinced that the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness." The experts have proved themselves fully able to meet the demands of this rule. Thus in the notorious case of *Sharon* v. *Hill,* 26 Fed. 337, it was said of the work of a distinguished expert and microscopist: "Assuming that his observations and delineations are correct, to the contrary of which nothing appears save the surmises and conjectures of counsel, he has accumulated a great mass of material facts, from which any person of ordinary intelligence and power of observation and deduction may draw a comparatively safe conclusion as to the question in dispute, so far, at least, as the same can be determined by an inspection of the writings themselves. A peculiarity in the formation of a letter or the manner of writing a word, that, under ordinary circumstances, would not be discerned or apprehended, when magnified several hundred times, becomes as noticeable as the features of the human face. Dr. Piper states that a person, in writing, usually makes his terminals and 't' crossings with less care or consciousness than any other part of the word; from which he deduces the conclusion, and a very plausible one, to say the least of it, that a person engaged in making a tracing of another's writing is apt to betray himself by lapsing into his own habit or style at these points. The tables of enlarged terminals and 't' crossings, taken from the admitted writings of the parties, show a very marked difference; those of the defendant being blunt or clubbed at the latter end, while those of the plaintiff are generally lighter, and invariably pointed or tapering at the termination." In *Green* v. *Terwilliger,* 56 Fed. 384, Judge Hawley said: "The arguments of counsel were principally directed to a discussion, review and criticism of the testimony of the professional experts Mr. Hyde and Dr. Piper. These witnesses prepared a great number of plates and tables showing the signatures and letters of each signature to the deed X and to the will, and the comparisons thereof with the admitted signatures of Philanda Terwilliger and John Terwilliger to the various exhibits offered in evidence. Some of the tables prepared by Dr. Piper make comparisons of the signature of Philanda Terwilliger with the signature of her name as found in the Bible and on the bank bill. All of the tables prepared by him were made by the aid of his microscope and camera lucida. Enlarged photograph copies, proven to have been correctly made, of the will, and of the signatures of Philanda Terwilliger on the standards, in the Bible, and on the bank note, and of the signature of John Terwilliger, as found in the county warrant book, in a mortgage, and to the marriage certificate, were admitted in evidence. These copies were of great assistance and value to the counsel in their arguments, and have materially aided the court in its investigation, in comparing and examining the different species of handwriting exhibited in the original documents."

In some instances the proof amounts to a mathematical demonstration. In the Rice Will Case, 81 App. Div. 223, *affirmed* 176 N. Y. 570, involving the will which was the alleged motive in the Patrick murder case, it appeared from the photographs and enlargements adduced by an expert that the four signatures to a will were absolutely identical, so that they could be superimposed without showing the slightest divergence in the length or direction of a line. This, as the court said, demonstrated conclusively that they were not genuine but tracings. See Osborn on Questioned Documents, p. 299, for a reproduction of the signatures photographed with ruled squares

showing their identity. A like identity of thirty signatures was shown in the Howland Will Case, and a famous mathematician testified that the probability of its honest occurrence was represented by a fraction whose numerator is one and whose denominator is nine hundred and thirty-one quintillions. See Osborn on Questioned Documents, p. 277.

A striking instance of reliance on expert testimony is afforded by the very recent case of *Baird* v. *Shaffer,* (Kan.) 168 Pac. 836. The writer is indebted to the courtesy of counsel for the contestants for a copy of the will in question and photographic copies of the signature thereto and of admitted signatures of the supposed testatrix. The will, disposing of an estate of about $30,000, left $5.00 to an invalid husband, to a "beloved son" $500, to each of two grandchildren $250, to a sister $100, and all the residue of the estate to a brother and sister jointly. The court states that "there were three witnesses to the will and they all testified positively that Mary A. Baird had signed the will in their presence." The principal evidence in opposition was that of an expert, testifying from a comparison of the signature to the will with three admitted signatures of Mary Baird. A jury found the will to be a forgery and the court sustained the finding, saying: "Where the signature to a will is a forgery, and where the attesting witnesses have the hardihood to commit perjury, it is difficult to see how the bogus will can be overthrown except by expert and competent opinion evidence tending to show that the pretended signature is not that of the testator, but spurious. The rule contended for by appellants would frequently baffle justice and give judicial countenance to many a high-handed fraud. . . .

"In addition to much expert and opinion evidence that the signature to the will was not that of Mrs. Baird, there were submitted to the jury photographically enlarged copies of the genuine signatures of Mrs. Baird and of the signature of her purported will. The difference between the admittedly genuine signatures and the signature to the will was so obvious that any juryman—any layman of common intelligence and ordinary capacity for observation—would readily discover it." The signatures compared, which the writer regrets that it is not practicable to reproduce here, bear out strongly the general theories of the experts as shown in other cases. There is plainly visible the difference in the characteristic of the terminals commented on by Dr. Piper in *Sharon* v. *Hill.* There is even to the untrained eye a very distinct impression that the disputed signature was made by a more skilful hand than that which framed the admitted signatures—a common characteristic in case of forgery. "It (a letter in the disputed signature) was made by a facile pen and is as impossible to any effort of Philinda Terwilliger's as it is possible to imagine" testified Mr. Hyde in *Green* v. *Terwilliger,* 56 Fed. 384.

So in less than a century has the handwriting expert passed from contemptuous disbelief to acceptance in the face of three alleged eyewitnesses; another light of science has brought confusion to the vermin of crime that lurk in the secret crannies; another step has been taken toward the day when the hidden things shall all be made plain and the dark places shall all be made light by the aid of the divinity planted in the human mind.

W. A. S.

## GREAT AMERICANS AND THE LAW.

LORD BRYCE'S recent *Fortnightly Review* article on the perennially interesting subject of "Great Men and Greatness" has evoked much comment from the press and not a little criticism has been leveled at the list of the twenty whom he considers may be termed "great." Excepting Luther and Loyola, his list is entirely composed of soldiers and statesmen. Literature, Science, and the Arts point to works of mighty genius, display creations of such splendor and sublimity that their mere reflection embellishes the present, and demand enrollment of their immortal creators in the pantheon of the "great." No one, however, has advanced any claim for the lawyer, although his name shines on the pages of history and in every country and in every age he has been a star of distinguished magnitude in the constellations of the great. It may therefore be of interest to attempt to point out who among the admittedly great men of our own country have been both great lawyers and great men.

As the verdict of contemporaries is not always affirmed by posterity, the names of living men must of course be excluded from consideration. Popular contemporary fame is a fickle jade. As on a historic occasion the populace sang "Hosanna" on the first day of the week and cried "Crucify Him" on the sixth, so the noble demigod of yesterday may become the licentious demagogue of to-morrow; the fame of one day may become the infamy of the next.

Likewise the names of recent dead must be omitted. One cannot measure the height of a mountain while standing in its shadow. Time is more logical and more merciless than man. It sublimates all reputations. It applies the rule of the survival of the fittest. With very few exceptions, history has not fixed its final seal upon greatness or even upon fame, until years after *Nunc dimittis* has been pronounced.

There are great men and Great Men. There are not many in the first class and very few in the second. Of all men that have lived in all times, the biographical dictionaries have kept alive not more than 20,000 names and only a small fraction of these may fittingly be described as great.

What then is a great man? Definition is essential, but it is not necessary for our present purpose to explain him. Whether the great man theory of history that great men are the creators of circumstances is correct, or whether the social economic theory that he is the creature of circumstances holds the truth, or whether again he is not rather the product of a combination of both, natural endowment linked with opportunity at the right historic moment, matters nothing. By what union of merits, whether of intellect, will, courage, energy, industry and moral qualities, men lift themselves above the mass and rise to greatness may be left to the speculative moral philosophers. We know that it is an instinctive characteristic of man to rebel against all limitations. Indeed the history of civilization is in large part the history of surmounting limitations and the acquirement by man of greater freedom and power than Nature originally gave him. He craves the limitless. He breathes the spirit of life into inert marble, he interprets the loftiest thoughts and profoundest emotions in terms of sensuous color, rapturous harmonies and inspired verse. He conquers the

earth, invades interstellar space, weighs the suns, analyzes the stars and follows the comet, in his reckoning, through an orbit of billions of miles, predicting the very instant of its return centuries hence. "And it does not yet appear what he shall be." And so we trace his gradual ascent through the ages from the prehistoric jungle to the sublime heights reached by a Plato, a Homer, a Dante, a Shakespeare, a Newton, a Praxiteles, an Apelles, a Beethoven and a Mozart. These are great men, differing from each other as one star differeth from another in glory. And they are great men because they were differentiated from the mass of their own and other times by the greatness of their natural endowments and the splendor of their genius. But these great men and a few others like unto them were not Great Men, acclaimed as such by the world. The Great Man, plus natural endowment and magnificent genius, must possess something more, he must be the master of himself and of his conditions. He is distinguished by the power which he is able to wield over his time and over the world.

This may be illustrated from history. Fourteen men, from Alexander to Frederick II (the last to be so designated), have borne the title of "the Great," bestowed by historians and confirmed universally by the world at large. All of these men, save one, Albertus Magnus, the scholastic philosopher, were men of action, soldiers, statesmen, the founders of nations, the leaders and the rulers of men. This is likewise true of other Great Men who have received the title by courtesy or at the hands of partial historians, among them Cyrus, Louis XIV,, Mithridates and Justinian. And it is not less true, but rather emphasized, in men who never were entitled the Great but who nevertheless are among the very greatest of all time, among them Cæsar, Augustus, Pericles, Cromwell, Napoleon and our own Washington and Lincoln.

The American Republic has had her great men and her Great Men and among the most distinguished in both classes we find the lawyer. Who are the great Americans? It will be convenient to segregate them in groups, limiting the scope to names admittedly great each in his class.

Literature: Emerson, Poe, Whitman, Longfellow, Whittier, Lowell, Irving, Hawthorne, Holmes, Bryant, Cooper, Motley and Prescott. Of these Bryant was a lawyer, Irving, Holmes, Motley and Prescott studied law.

Science: Agassiz, Audubon, Gray, Maury and Joseph Henry.

Educators: Horace Mann, Mark Hopkins and Francis Wayland. Of these Mann was a lawyer.

Inventors: Fulton, Whitney, Morse and Howe.

Theologians: Edwards, Channing, Parker and Bushnell.

Explorers: Boone, Lewis, Clark, Judson and Kane.

Philanthropists: Cooper and Peabody.

Artists: Stuart, Powers and Copley.

Soldiers and Sailors: Grant, Lee, Farragut, Decatur, Jackson, Greene, Perry, Sheridan, Thomas and Sherman.

Lawyers: The following list is not intended to be complete but is merely illustrative of names worthy to rank on the bead-roll of great men with those mentioned before —Joseph Story, James Kent, John Jay, John Quincy Adams, Rufus Choate, Luther Martin, Roger B. Taney, Benjamin R. Curtis, Jeremiah S. Black, Reverdy Johnson, William Wirt, Salmon P. Chase, Lemuel Shaw, Caleb Cushing, Charles O'Conor, Charles Sumner, Thomas Benton, William Pinkney, Edward Livingston, William H. Seward and William M. Evarts.

The legal profession may well feel proud to be represented by such names as these, men whose fame successfully challenges comparison with that of the great judges, great lawyers, forensic and parliamentary orators of any country and any time. The ancient proverb has it that "Lady Common Law must lie alone," meaning that the great lawyer must be a mere lawyer. But these men were not merely great lawyers. They were men of varied accomplishments, great erudition, high authority and of wonderful power in the perfect discipline of their minds. The attainment of such pre-eminence in the law requires more sheer intellectual power combined with unremitting industry and zeal than does the attainment of a like preeminence in any other profession or vocation whatsoever. As Story himself eloquently said: "The law is a science of such vast extent and intricacy, of such severe logic and nice dependencies, that it has always taxed the highest minds to reach even its ordinary boundaries. But eminence can never be attained without the most laborious study united with talents of a superior order. There is no royal road to guide through its labyrinths. These are to be penetrated by skill, and mastered by a frequent survey of landmarks. It has almost passed into a proverb that the lucubrations of twenty years will do little more than conduct us to the vestibule of the temple; and an equal period may well be devoted to exploring the recesses."

Having glanced at a few of the great men let us now consider briefly the Great Men, confining ourselves to "America's wonderful century" beginning with her assertion of Independence and ending with the abolition of slavery.

During the colonial period of our history the clay which was destined for the formation of great men was undergoing a new process; a fresh mold was cast, new forms gradually emerged. Strong men, exalted characters, growing greater and greater, appeared and before the end of the eighteenth century the breath of genius entered into them, a new era began, the Republic was born. It was as if Time itself had collected into one focus the great rays of its genius, for never since the Periclean age had a people, so few in numbers, produced such a galaxy of men in one generation.

Our liberties were established with the help of many men and among them five stand forth as indubitably Great—George Washington, Thomas Jefferson, Alexander Hamilton, John Marshall and Benjamin Franklin. Washington is a world figure and the others are accepted of the world. Three of these were great lawyers—Jefferson, who penned the greatest charter of human rights ever inscribed on parchment; Hamilton, who with Jefferson largely conceived the form of government that was to be ordained and whose name is indissolubly connected with "the most wonderful work ever struck off at a given time by the brain and purpose of man"—the American Constitution; Marshall, whose labors in expounding that instrument, without precedent to avail but with a far seeing statesmanship to guide, transcended the achievements of any jurist that ever lived. These men, with two others of scarcely less stature, John Adams and James Madison, these lawyers, are Great Men because they established liberty, con-

ceived a nation, laid the foundations for and reared the loftiest edifice of political glory the world had yet seen.

Before these intellectual suns had set, the great triumvirate sent its brilliant rays high in the national heavens —three lawyers, Webster, Clay and Calhoun. Clay the perfect orator who sought to avert disaster with compromise and conciliation, Calhoun the logician who sought the same end with artificial balances of power, Webster, a Great Man, an Olympian Jove worthy of Greece or Rome at the very summit of their civilization and power, of whom Carlyle said: "As a logic-fencing advocate and parliamentary Hercules, one would incline to back him at first sight against the extant world."

The Civil War gave us great soldiers and a few great statesmen and one Great Man, acclaimed as such by the whole world, the lawyer Abraham Lincoln.

Nearly one-third of the Immortals first enthroned in the national pantheon, at University Heights, New York, may be claimed by the lawyers. The Hall of Fame was established and dedicated to commemorate "Great Americans." The method of selection and election is virtually equivalent to a national plebiscitum. Fifty names were to be inscribed in this temple down to the beginning of the present century. Of the first fifty names only twenty-nine received a majority of the electors and of these eight were lawyers—Lincoln, Webster, Marshall, Jefferson, Clay, Kent, Story and John Adams. Yet another, Horace Mann, elected as an Educator, was also a lawyer.

The highest position in life possible to the American citizen is that of the Presidency. Twenty-seven men have occupied this exalted station and of these, two-thirds were lawyers. And of the great Presidents, those who added luster to the office by the grandeur of themselves, all save Washington alone were lawyers.

It may be said that some of these men achieved greatness not as lawyers but rather as statesmen, but the answer is that they were great statesmen because they were great lawyers. The United States is a country of written constitutions and it is necessary for the statesman to think in terms of constitutional law. Two thousand years ago Tully wrote: "It is necessary for a statesman to be thoroughly acquainted with the Constitution; and this is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection, without which no Senator can possibly be fitted for his office."

Time has established the American lawyer in the fane of the American great. He led in the struggle for independence, he founded a nation, he moulded its institutions, he defended and preserved the landmarks of its constitutional liberty. As the strength and glory of a nation depend upon its laws and the manner of their administration, and as these are placed under the guardianship of the bar of America, great things will be required from the great lawyers to come. As we contemplate these great lawyers of the past and behold the enduring monuments of their labors, we may confidently believe that the gods who give the increase will send their successors and will not withhold the same vital spark which animated their work and made it productive of blessings to future generations.

OTTO ERICKSON.

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"Courts of justice will not shut the door in the face of the penitent." Johnson, J. De Wolf *v.* Johnson, 10 Wheat. 392.

## DAMAGES AND GRATUITOUS RIDES IN MOTOR CARS.

THE average person who out of the kindness of his heart offers "a lift" to a friend would be surprised if he were told that he was thereby burdening himself, not only with the additional weight of his friend, but also with a latent liability. If an accident occurs he may find himself sued for injuries sustained by his friend. The gratuitous nature of his services to his friend may avail him nothing. In certain circumstances he must make good to his friend in damages the injury he has unintentionally done to him, or which arises out of the kindness of his own heart. A case involving the question of this liability to a person who has received injury during a gratuitous ride in the defendant's motor car was recently before the Court of Appeal, when occasion arose for laying down the legal duty which a man owes to another whom he takes gratuitously for a drive in his motor car. The case—*Karavias* v. *Callinicos* (1917, W. N. 323)—is noteworthy, in that the Court of Appeal applied an old legal principle to circumstances essentially modern.

The principle involved in determining the measure of a host's liability to his guest for injuries sustained by the latter while in the position of an invitee of the former falls under a heading of law peculiar to itself. It is not contract. It is rather a question of tort. Invitation is a recognized thing in law. The relationship between host and guest is not a contractual relationship. So far as it involves liability on the host, such liability is to be regarded as founded on negligence. The guest is entitled, it seems, to expect protection from injury resulting from the gratuitous entertainment afforded by the host. But, on the other hand, the liability of the host is limited. We speak, of course, of things in general, and none of these or the following observations are intended in any way to refer to the facts in the recent case which we have mentioned. We shall allude to those facts in due course, but only so far as necessary.

The word "invitation" is well known to the law. But in law the term "invitation" and its associates "invitees" and "invitors" (not "host" and "guest") are used for defining legal relationships —obligations on the one side and rights on the other. It is, however, with the somewhat narrower branch of the law that we propose to deal—namely, with the rights and duties involved by the gratuitous carriage by one person of another.

"A person," said Baron Parke in the case of *Lygo* v. *Newbold* (1854, 9 Ex. 302), "who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care." This puts the matter in a nutshell. But suppose a man to lend his friend a horse, and the horse trips and the friend receives injuries, is the lender liable? It is obviously impossible to answer this question without many qualifications, provisos, exceptions, and explanations. So it is very obvious that, having put the matter in a nutshell, we shall have to take it out again to examine it.

In *Lygo* v. *Newbold* (*sup.*) the plaintiff contracted with the defendant for the carriage of her furniture. The defendant sent a cart and man—plus, of course, a horse—to convey the goods. The plaintiff, when the furniture had been duly placed in the cart, asked the man's permission to ride in the cart. The cart proceeded on its journey, the defendant's man having given the permission asked for, and the plaintiff having availed herself of it. The lady seems to have had her doubts as to the soundness of the vehicle. She intimated her doubts to the driver, and he got down and performed certain repairs, which seems to suggest that the lady's doubts were well founded, if, indeed, subsequent events did not put the matter beyond the region of doubt. In due course

the catastrophe happened. For this she brought an action and recovered judgment for the injury done to her furniture, but, having in mind the injury done to herself, she sought to adjust matters and to recover damages under what we must call the latter head. But the court, on the ground that she had taken her seat in the cart without the defendant's permission, held that the mischief in respect of which she made her further claim was caused by her own default. Baron Parke in the course of the argument let fall the dictum mentioned above. As, however, the court decided the case on a different ground, the authority of the dictum, which was essentially *obiter*, might be regarded as of qualified authority.

In one case—*Scott* v. *London and St. Katherine's Docks Company* (13 L. T. Rep. 148; 3 H. & C. 596)—six bags of sugar fell out of a warehouse and injured a Custom House officer who happened to be underneath. Now, it is clear that bags do not fall out of warehouses in the ordinary course of things. This case and the actual incident was referred to by Lord Chelmsford in *Moffatt* v. *Bateman* (22 L. T. Rep. 140; L. Rep. 3 P. C. 115, at p. 122). His Lordship pointed out that there was undoubtedly the strongest *primâ facie* presumption of negligence in the dock case, because it is not in the ordinary course of things that loaded bags should fall out of a warehouse on a person below. The learned Chancellor, however, distinguished the dock case from the case before him (*Moffatt* v. *Bateman*), which was a case concerning the gratuitous use of horses and a buggy in Australia. "There is nothing more usual," said his Lordship, "than for accidents to happen in driving, without any want of care or skill on the part of the driver." In that case the plaintiff was being driven gratuitously by the defendant. An accident occurred, and the horses bolted with the fore part of the buggy, while both the plaintiff and defendant were thrown out and injured. The Judicial Committee of the Privy Council took the view that there was no evidence of such gross negligence on the part of the defendant as to render him liable to the plaintiff for the injuries suffered by the latter. The case is particularly instructive in that the committee gave judgment on the ground that there was no evidence to establish a case of gross negligence.

At this point we may observe that there is obviously a wide difference between requiring the host, as we may call him, to exercise reasonable care, and only holding him liable for gross negligence. The word "gross" is a strong one. There are many degrees of negligence falling short of gross negligence. The trend of modern cases has undoubtedly been towards placing on the host a more stringent obligation than the obligation to avoid gross negligence on his part. If this be right, the case of *Moffatt* v. *Bateman* (*sup.*) would appear to be somewhat misleading. For some years, indeed, the matter was left in doubt. The measure of the obligation of the host to his guest was uncertain. Whether the courts have been strictly logical in increasing that measure may possibly be doubted. But that has been the tendency. It has often been said that a licensee is entitled not to have a trap set for him. If he is allowed by license to traverse the premises of another, he is entitled to some measure of protection from latent defects constituting a danger and likely to cause him injury if known to the licensor. Such danger constitutes the trap against which the licensor must warn him.

But a guest gratuitously conveyed by his host is more than a mere licensee. He is an invitee. And it has been rightly said that there is an obvious difference between the measure of confidence and responsibility accepted in the case of a person who merely receives permission to traverse another's premises and the case where a person is received into the custody of another for transportation. This distinction, and very much in the actual words we have used, was laid down by Lord Collins, when Master of the Rolls, in the case of *Harris* v. *Perry and Co.* (89 L. T. Rep. 174; (1903) 2 K. B. 219, at p. 226). In that case the plaintiff, who was an inspector appointed by the engineer of a tube railway in course of construction, accepted an invitation to ride on an engine of the contractor, and, an accident occurring, the Court of Appeal held that the contractor was liable on the ground that there was evidence of a failure of due care on the part of the contractor's servants. The court held that the care exercisable must be reasonable. This puts the case higher than Lord Chelmsford put it in *Moffatt* v. *Bateman* (*sup.*).

In *Harris* v. *Perry and Co.* (*sup.*) Lord Collins pointed out that the standard of reasonableness must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. Undoubtedly the nature of the conveyance is one of the most important considerations.

Now turning to the recent case mentioned in the opening lines of this article, in that case Mr. Justice Avory left to the jury these two questions: First, were the injuries to the plaintiff caused by the failure of the defendant to exercise due and reasonable care? Secondly, was the defendant guilty of gross negligence? The jury answered the first in the affirmative and the second in the negative, and assessed damages. His Lordship gave judgment for the plaintiff, and the defendant appealed. The Court of Appeal dealt with the question of the measure of responsibility, and in effect held that gross negligence on the part of the defendant was not essential to the cause of action. In other words, we may now take it that failure to exercise reasonable care on the part of the host gives a cause of action to the guest for injuries resulting in a motor car accident. The law, therefore, stands as defined by the dictum of Baron Parke in the case of *Lygo* v. *Newbold* (*sup.*), and the standard suggested by the case of *Moffatt* v. *Bateman* (*sup.*) must now be taken as being too low.

Having taken the matter out of the nutshell in which it was placed by Baron Parke, we may now return it, with this comment, that the law as therein defined applies just as much to motor cars as to any other means of conveyance.—*Law Times.*

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"The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual and spiritual needs may also be considered. The eagle is preserved, not for its use but for its beauty." Per Andrews, J., in Barrett *v.* State, 220 N. Y. 428.

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"It is the duty of the municipal authorities to exercise an active vigilance over the streets; to see that they are kept in a reasonably safe condition for public travel. They cannot fold their arms and shut their eyes, and say they have no notice." Per Earl, C., in Todd *v.* Troy, 61 N. Y. 509.

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"The supposition that the power may be abused is of no importance, if the public good requires its exercise. This feverish jealousy is a passion that can never be satisfied. No man denies the propriety of the legislature having a taxative power. Suppose it should be seriously objected to, because the legislature might tax to the amount of 19s. in the pound. They have the power, but does any man fear the exercise of it? A legislature must possess every power necessary to the making of laws." Per Mr. Justice Iredell in Talbot *v.* Jansen (1795) 3 Dall. (U. S.) 133, 163, 1 U. S. (L. ed.) 540, 553.

# Cases of Interest

LIABILITY OF INNKEEPER FOR INJURY TO GUEST AT FIRE DUE TO FAILURE TO PROVIDE FIRE ESCAPES AS REQUIRED.—The question stated in the catchline was raised in Hoopes *v.* Creighton, 100 Neb. 510, 160 N. W. 742, Ann. Cas. 1917E and note. It was decided that a hotel owner may not omit to do the things that are reasonably necessary for the safety and protection of the guests of the house, and if he disregards the provisions of the law concerning the establishment of fire escapes upon the building, and such other devices as the law provides for, he will be held liable for the damages sustained because of the death of any guest which may be brought about by his negligence, and the fact that the statute or ordinance in question does not in terms impose a civil liability for its violation, does not affect such evidence of its violation as may go to show negligence.

DICTATION OF LETTER TO STENOGRAPHER AS PUBLICATION OF SAME.—The dictation of a letter to a stenographer by an officer of a corporation, in whose employ the stenographer was, is now held to be not a publication when done in the course of business, although formerly a different view was taken. The case of Cartwright Caps Company *v.* Fischel, reported in 113 Miss. 359, 74 So. 278, lays down the present rule. It is also reported in Ann. Cas. 1917E 985 where a note collects the authorities and discusses the rule. The opinion of the court in part reads as follows: "The appellant in this case is a corporation, and, of course, can act only through agents, and the acts of both the president and the stenographer to whom the letter was dictated are the acts of the corporation. In our opinion, under the present conditions, the dictation of a letter to a stenographer, when employed by the persons or corporation as a stenographer in the business, is not a sufficient publication, in the absence of any repetition by the person or stenographer to other persons."

POWER OF PUBLIC SERVICE COMMISSION TO REQUIRE PULLMAN CAR SERVICE ON BRANCH LINE.—Under a statute empowering a public service commission to require equipment and service for the convenience of passenger transportation, it was held in State *v.* Atkinson, 269 Mo. 634, 192 S. W. 86, Ann. Cas. 1917E 987, that the commission had the power to compel a railroad company to install a sleeping car service on a branch line, and that an order for such a service was not rendered unreasonable by the fact that its operation entailed a financial loss, provided the sleeping car service on the entire system including that branch yielded a reasonable profit. The court reasoned as follows: "If as we have concluded, in this day of transportation, sleeping car service is necessary for the 'comfort or convenience' of the traveling public, then mere loss on one portion of such service on a branch line, would not of necessity invalidate an order for the service. The whole service of the particular kind and character must be considered, and not isolated portions of it. The fact that an isolated portion did not pay would only be one of many facts to be considered in determining the reasonableness of the order."

LIABILITY OF FIRE INSURANCE PATROL IN TORT.—That a board of underwriters engaged in protecting life and property from fire through its patrols is not a charitable organization but a corporation organized primarily to protect the property and minimize the losses of its members, and is liable for the negligence of its servants, is the holding in Sutter *v.* Milwaukee Board of Fire Underwriters, 161 Wis. 615, 155 N. W. 127. The case is further reported with annotations in Ann. Cas. 1917E 682. The court says: "Effort made or work done in furtherance of private interest does not become charity because such effort or work at the same time promotes the public interest. Charity has been many times defined since Saint Paul gave his world-famous definition to the Corinthians, but no definition yet attempted, we think, includes the work, in his own interest, of the great inventor, the eminent physician, or the corporation (sec. 1494, Stats.) for the prevention of horse stealing, or the work of the incorporated detective agency. Even a municipal corporation, when engaged in the performance of duties not governmental, is responsible for the negligence of its servants."

VALIDITY OF INDICTMENT FOUND BY A GRAND JURY WHICH CONTAINED COMPLAINANT.—In a late Canadian case, namely Verronneau *v.* The King, 54 Can. Sup. Ct. 7, also reported in Ann. Cas. 1917E 612, it was held that it was not ground for quashing an indictment that the complainant was a member of the grand jury by which it was found, where he took no part in the deliberation therein. The Chief Justice said: "In answer to the first question I would say the grand jury was regularly constituted notwithstanding that Bachand, who was the party complainant before the magistrate in this particular case, was sworn as a member of it. A grand juror is not sworn like a petit juror to try and a true deliverance make on the evidence submitted. His duty is to diligently inquire and a true presentment make of all such matters and things as shall be given him in charge or shall otherwise come to his knowledge. Until quite recently grand jurors might make presentments of their own knowledge and information without the intervention of any prosecutor on the examination of any witnesses. Vide Report of Royal Commissioners on English Draft Code, pages 32 and 33."

EXCLUSION OF PUBLIC FROM COURT ROOM IN CRIMINAL TRIAL AS REVERSIBLE ERROR.—A constitutional provision declaring that in all criminal prosecutions accused shall have the right to a public trial, is not infringed because the courtroom is not large enough to include all persons, or because of an order closing the door after the room is filled. Nor is it infringed because to preserve decorum disorderly persons are ejected or excluded. But it is infringed by an order of the court to the bailiffs to refuse admittance to members of the public not already in the courtroom, and to prevent persons then in the courtroom, and leaving, from returning, notwithstanding that an exception is made as to newspaper men and attorneys. State *v.* Keeler, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E 619, wherein it is held that such infringement constitutes reversible error. The opinion contains a thorough discussion of the subject and a note in Ann. Cas. 1917E at p. 625, states that the reported case is the only recent decision wherein the exclusion of spectators from the courtroom during a criminal trial has been held to infringe the right of the accused to a fair and public trial, though there is dictum in People *v.* Letoile, 31 Cal. App. 166, 159 Pac. 1057, disapproving of an order excluding all persons other than those directly connected with the trial. The particular order passed on was held to be reasonable and proper under the circumstances.

ESTABLISHMENT OF HOME FOR INDIGENT WOMEN AS CHARITY.—Whether the term "charity" includes a home for indigent women, where preference is given to the testatrix's relatives, was the interesting question raised in Matter of MacDowell, 217 N. Y. 454, 112 N. E. 177, the case being also reported and annotated in Ann. Cas. 1917E 853. The holding of the case is that a testamentary provision giving property to be invested and the income to be used for hiring and maintaining a house to be used as a home for refined, educated, Protestant gentlewomen, whose means are small and whose home is made unhappy by having to live with

relatives who think them in the way, with a preference to testatrix's sister and to her named cousins and their lineal descendants forever and to her named friends, all inmates of the home to pay board not to exceed $7 per week toward paying the expenses of the home, is not rendered invalid as a charitable trust because of the preference given to testatrix's relatives and friends; though if the purpose had been to create a trust only for their benefit it would not have come within the designation of a "charitable trust." Seabury J., said: "If the purpose of the testatrix had been to create a trust only for the benefit of her own relatives and certain designated friends and their lineal descendants, the trust would not come within the designation of charitable trust (Matter of Shattuck, 193 N. Y. 446, 86 N. E. 455; Kent *v.* Dunham, 142 Mass. 216), but if the purpose of the trust was public the mere fact that the testatrix intended to give a preference to certain relatives or friends and their descendants, who should be within the object of the trust, does not make it invalid or preclude it from possessing the character of a charitable trust."

EFFECT OF EXISTENCE OF WAR ON DECLARATION OF ALIENAGE.—In the interesting English case of the King *v.* Commanding Officer Thirtieth Battalion Middlesex Regiment [1917] 2 K. B. 120, reported and annotated in Ann. Cas. 1917E 480, it is held that a person born in England of alien parents cannot on arriving at his majority make a declaration of alienage, where a state of war exists with the nation of his father's birth, and he has during his minority been enrolled in the British army. Viscount Reading, C. J., said: "I have come to the conclusion that a person cannot divest himself of his British nationality during time of war, and become a subject to an enemy state, and that this section must be read subject to that well-known principle. If any authority is required for this principle, it is to be found in Rex *v.* Lynch [1903] 1 K. B. 444, 459, and Halleck's International Law, 1st ed. ch. 29, s. 29; 4th ed. vol. 1, ch. 12, s. 29. I do not propose to express any opinion upon the point which has been discussed as to whether this principle would equally apply if a British subject wished in time of war to divest himself of his allegiance so as to become the subject of a neutral state; but in Rex *v.* Lynch [1903] 1 K. B. 444, 459, Lord Alverstone, C. J., in his judgment made it plain that a British subject could not become naturalized as a subject of an enemy state during war. That principle is applicable to this case. As Wills, J., said in his judgment, if the contrary view were to prevail, 'an army might, if each member of it were individually to accept letters of naturalization from the enemy, desert in the hour of battle without rendering any of its members liable to the penalties of treason.' Of course it may be said it is difficult to see how those circumstances could occur during war; but for the purpose of testing the point they form a very useful argument."

LIABILITY OF AUTOMOBILE MANUFACTURER TO ULTIMATE PURCHASER OF AUTOMOBILE FOR NEGLIGENCE IN CONSTRUCTION.—The facts in Cadillac Motor Car Company *v.* Johnson, 221 Fed. 801, reported and annotated in Ann. Cas. 1917E 581, were that in March, 1909, Johnson, the plaintiff below, bought of a dealer an automobile known as the Cadillac motor model 30, manufactured by the defendant. In July of the same year, while driving at from 12 to 15 miles an hour, the front right wheel broke, the car turned over, and Johnson sustained most serious injuries. He brought suit to recover damages therefor, charging the defendant with simple negligence in respect to the wheel. A judgment for the plaintiff below was affirmed by the United States Circuit Court of Appeals. The crux of the case is given in the language of Circuit Judge Ward as follows: "The ultimate question is—can a manufacturer of motor cars escape liability for an injury occasioned by a grossly defective wheel by proving that he purchased the wheel from a reputable manufacturer? I think this question must be answered in the negative. The law imposes the duty of constructing a safe machine upon the manufacturer. He cannot avoid that duty by buying his materials from others. He is responsible for the car sold as having been manufactured by him. In the present case the defendant's representative sold the car to the plaintiff under an implied warranty that the wheels were made of reasonably sound material. Instead of being sound and staunch, one wheel was rotten and wholly incapable of withstanding the strain put upon it. This condition could have been discovered by subjecting the wheel to the simplest tests. If the rule contended for by the defendant be the law, a manufacturer can sell a machine which menaces the lives and limbs of those who use it, and escape all liability by asserting that he bought the materials from dealers whom he supposed to be careful and prudent."

APPLICABILITY OF WORKMEN'S COMPENSATION ACT TO WATCHMAN WHO FALLS ASLEEP WHILE ON DUTY.—In the case of Gifford *v.* Patterson, 222 N. Y. 4, the rule was laid down that when an employee was injured through some act of his own, not an incident to his employment, and not authorized or induced by his employer in connection with his employment, the injury did not arise out of and in the course of his employment within the meaning of the language of the New York Workmen's Compensation Act, and the rule was applied where a night watchman while asleep at his post of duty fell out of a window and was killed. The court in reversing an order of the State Industrial Commission based on findings that the fact that the deceased was asleep was not an unreasonable act and did not constitute an abandonment of employment, but amounted at the most to negligence only, said: "We think that as matter of law the conclusions of the commission are not justified by the facts found. (Matter of Glatzl *v.* Stumpp, 220 N. Y. 71, 75). The duties of Gifford were to 'watch the premises . . . and to go around the building for that purpose.' The findings show that he abandoned his duty and after first obtaining a chair sat therein on the second floor of the building at an open doorway and sitting therein 'dozed off' and fell down a chute and received the injuries from which he died. He was employed to watch the premises. Instead of doing so he prepared for himself a comfortable position and slept. If, in connection with his employment, he was authorized or permitted to procure a chair and spend a portion of his time therein 'dozing off' in the doorway, it was not shown before the commission. His injury was not received as a natural incident of his work. It was not a risk connected with his employment or arising out of and in the course of his employment. The acts of Gifford as found by the commission, instead of being in the course of his employment, were directly contrary to the object and purpose for which he was employed."

STATE WORKMEN'S COMPENSATION ACT AS APPLICABLE TO NONRESIDENTS.—The case of Douthwright *v.* Champlin, 91 Conn. 524, 100 Atl. 97, Ann. Cas. 1917E 512, presents the question of the applicability of the Connecticut Workmen's Compensation Act to an injury received by a non-resident employee, working for a non-resident employer under a contract of employment made outside the state, where both accept the Connecticut Act. The court takes the view that the Act is applicable to such a state of facts and says: "We have held that our state might provide, in a workman's compensation Act, compensation for injuries arising out of and in the course of the employment under a contract made in Connecticut but performed outside our state. We held that our Act, not by direct expression, but by reasonable implication,

when read in the light of its purpose, subject-matter, and history, indicated an intent that contracts of employment made here might operate outside our jurisdiction. As a necessary corollary we held that we would 'give similar effect to contracts of like character to those before us, though made under a compensation Act of another jurisdiction, provided they did not conflict with our law or public policy, and the machinery provided for the ascertainment and collection of the compensation could be used in our jurisdiction.' Kennerson *v.* Thames Towboat Co., 89 Conn. 367, 381, 94 Atl. 372, L. R. A. 1916A 436. We can enforce only such contracts as are enforceable in the jurisdiction of their origin. So we apply to this somewhat novel contract the usual rules for the construction and enforcement of all contracts. The practical difficulties of enforcing the foreign contract, at least where the Act is contractual, will not be as a rule insuperable, if it is kept in mind that the right of compensation given by the Act and the venue are totally different concepts. The Act cannot create, and at the same time destroy, the right to sue upon a transitory action. The only actions to secure compensation under a foreign statute which we cannot enforce are those 'where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act.' Tennessee Coal, etc., R. Co. *v.* George, 233 U. S. 354, 359, 34 S. Ct. 587, 58 U. S. (L. ed.) 997, L. R. A. 1916D 685."

# News of the Profession

THE RHODE ISLAND BAR ASSOCIATION met in annual convention on December 3, 1917.

THE ASSOCIATION OF PROBATE JUDGES OF OHIO held its annual meeting at Cincinnati, Ohio, on January 8.

THE KANSAS COUNTY ATTORNEYS' ASSOCIATION met in annual convention at Topeka, Kan., on January 20.

THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA held its annual meeting in Washington, D. C., on January 8.

MINNESOTA PROBATE JUDGES.—The annual conference of Minnesota probate judges was held at Minneapolis, Minn., on January 16 and 17.

VETERAN VERMONT JURIST DEAD.—Thomas C. Robbins, for thirty years probate judge of Rutland county, Vt., died at Rutland on December 13, aged 92 years.

MADE MCADOO'S LEGAL ADVISER.—Former Judge John Barton Payne of Chicago has been appointed general counsel to the director general of railroads.

DEATH OF OHIO JUDGE.—John Allen Schauck, formerly chief justice of the Ohio Supreme Court and professor of law at Ohio State University, died at Columbus, O., on January 3, aged 77 years.

NAMED PROBATE JUDGE IN OHIO.—Governor Cox of Ohio has appointed D. W. Younker of Greenville to the bench of the Probate Court of Darke county, to succeed Judge Edward Boll, deceased.

DEATH OF PENNSYLVANIA JUDGE.—Judge Livingston L. Davis, judge of the Common Pleas Court of Allegheny county, Pa., for the past ten years, died at Pittsburgh on December 18, aged 65 years.

KENTUCKY ASSOCIATIONS HOLD JOINT SESSION.—The Circuit Judges' Association of Kentucky met in joint session with the Commonwealth's Attorneys' Association of Kentucky at Louisville, Ky., on December 28.

DEATH OF NORTH DAKOTA LAWYER.—Henry J. Linde, former attorney general of North Dakota and one of the best known attorneys of the state, died at Minneapolis, Minn., on December 29, aged 38 years.

NEW ATTORNEY GENERAL FOR WISCONSIN.—Spencer Haven of Hudson has been appointed by Governor Philipp attorney general of Wisconsin, to succeed Walter C. Owen, now a member of the Wisconsin Supreme Court.

PROMINENT GEORGIA JURIST DEAD.—David W. Meadow, judge of the Georgia Superior Court for eight years and prominent in legal circles throughout the state, died at Athens, Ga., on December 28, aged 65 years.

VETERAN ARKANSAS JURIST DEAD.—Burrill B. Battle, for twenty-six years a justice of the Arkansas Supreme Court and actively identified with Arkansas' early history, died at Little Rock, Ark., on December 21, aged 79 years.

APPOINTED ADDITIONAL LAW JUDGE.—Governor Brumbaugh of Pennsylvania has appointed James L. Brownson of Washington, Pa., additional law judge of Washington county to fill the vacancy caused by the death of Judge Robert W. Irwin.

DEATH OF FORMER INDIANA JUDGE.—Robert T. St. John, formerly a judge of the Indiana Circuit Court and prominent for many years in the legal and political circles of that state, died at Marion, Ind., on December 17, aged 90 years.

NEW JUDGE IN PENNSYLVANIA.—Governor Brumbaugh of Pennsylvania has appointed Henry G. Wasson of Pittsburgh to fill the vacancy on the bench of the Common Pleas Court of Allegheny County caused by the death of Judge Livingston L. Davis.

WOMAN APPOINTED PROBATE JUDGE.—Governor Capper of Kansas has appointed Mrs. Opal Brown of Troy to the bench of the probate court of Doniphan county. Mrs. Brown succeeds her husband, Edwin Brown, now a corporal in the National Army at Camp Funston.

INDIANA JURIST DIES SUDDENLY.—Alexander Dowling, aged 80, a judge of the Indiana Supreme Court from 1899 to 1905, and one of the most prominent attorneys in Southern Indiana, dropped dead in his law office at New Albany, Ind., on December 10.

FORMER MICHIGAN JUDGE DEAD.—Charles R. Brown, judge of the Michigan District Court, ninth district, from 1870 to 1876, and editor of Brown's Nisi Prius Reports and several legal text books, died at Cheboygan, Mich., on December 21, aged 81 years.

ELECTED PRESIDENT OF UNIVERSITY.—William Miller Collier, formerly American Minister to Spain, and editor of Collier on Bankruptcy, has been elected President of George Washington University, succeeding Rear Admiral Charles H. Stockton, U. S. N., retired.

DISTINGUISHED VIRGINIA JURIST DEAD.—Judge James Keith, for more than twenty years president of the Supreme Court of Appeals of Virginia, and a distinguished veteran of the famous Black Horse Cavalry in the Civil War, died at Richmond, Va., on January 2, aged 79 years.

CHANGES AMONG IOWA JUDGES.—Judge Charles Hutchinson of Des Moines has resigned from the bench of the Polk county, Ia., District Court, and Governor Harding has appointed Joseph E. Meyer as his successor. Joseph A. Dyer has been appointed to succeed Judge Meyer on the bench of the Municipal Court of Des Moines.

NOTED LAWYER DEAD.—Henry D. Estabrook, prominent for many years in law circles of New York and Nebraska, formerly solicitor general for the Western Union Telegraph Company, and Republican candidate for the presidential nomination in 1916, died suddenly at Tarrytown, N. Y., on December 22, aged 64 years.

DEATH OF PROMINENT SOLDIER AND LAWYER.—General Anson G. McCook, veteran of the Civil War, for years prominent in the politics of New York and Ohio, from 1884 to 1893 secretary of the United States Senate, and founder and publisher of the New York *Law Journal*, died at New York city on December 30, aged 83 years.

APPOINTED TO BENCH IN WISCONSIN.—Governor Philipp of Wisconsin has appointed George T. Robinson judge of the Municipal Court of the Western District at Oconomowoc to succeed Judge A. G. Derse, resigned. Another recent appointment is that of Charles R. Freeman of Menomonie to be county judge of Marinette county to fill the vacancy caused by the resignation of Judge J. W. Macauley.

THE NEBRASKA STATE BAR ASSOCIATION met in annual convention at Lincoln, Neb., on December 28 and 29. 1917. Officers for the ensuing year were elected as follows: President—Judge Arthur Wakeley of Omaha; first vice-president—Samuel Rinaker of Beatrice; second vice-president—C. L. Richards of Hebron; secretary—A. G. Ellick of Omaha; treasurer—Raymond M. Crossman of Omaha.

THE MISSOURI COUNTY JUDGES' ASSOCIATION at its recent annual convention elected the following officers: President—Alexander Carter, of Mexico, Audrain county; vice-presidents—John A. Fischer, of Boonville, Cooper county; F. L. Lloyd, of Monticello, Lewis county; Chas. C. Redman, of Kennett, Demklin county; A. W. Baker, of Lamer, Barton county; J. F. Kircher, of Harrisonville, Cass county; secretary and treasurer—C. P. Schmidt, of Maryville, Nodaway county.

APPOINTMENTS TO BENCH IN NEW YORK CITY.—Mayor Hylan of New York city has made the following judicial appointments: John A. Valentine, appointed to succeed the late Justice George Freifeld on the bench of the Municipal Court, Brooklyn; George J. O'Keefe, reappointed a justice of the Court of Special Sessions; William T. Croak, appointed a city magistrate for the Borough of Richmond; Harry Miller, reappointed a city magistrate for the Borough of Queens; Alexander H. Grismar, reappointed a city magistrate for the Borough of Brooklyn; James J. Conway, reappointed a city magistrate for the Borough of Queens.

OFFICERS OF OREGON BAR ASSOCIATION.—At its recent annual meeting, the Oregon Bar Association elected the following officers for the ensuing year: President—Circuit Judge Robert Tucker; secretary—Albert B. Ridgway; treasurer—A. M. Dibble; vice-presidents (one for each judicial district)—F. M. Calkins, John S. Coke, Percy R. Kelly, George W. Stapleton, James U. Campbell, G. W. Phelps, Fred W. Wilson, Gustav Anderson, Dalton Biggs, John W. Knowles, David R. Parker, Harry H. Belt, D. V. Kuykendall, L. F. Conn. T. E. J. Duffey. George R. Bagley and James A. Eakin; members of executive committee—B. B. Beekman, Warren E. Thomas, Oscar Hayter, A. F. Fiegel, Charles W. Cochran, H. S. McCutchan and Hugh Montgomery.

THE OKLAHOMA STATE BAR ASSOCIATION held its eleventh annual convention at Oklahoma city, on December 27 and 28, 1917. Judge F. M. Bailey of Chickasha delivered the president's address, and the annual address was made by Governor Charles H. Brough of Arkansas. Other speakers and their subjects were as follows: "The Lawyer's Relation to the World War," by Judge C. B. Stuart of Oklahoma city; "Workmen's Compensation Law," by J. S. Ross; "Probate Law," by H. A. Ledbetter; "War Tax," by D. A. McDougal; "The United States District Court," by Judge Ralph M. Campbell, federal judge for the eastern district of Oklahoma; "Lawyers of the Revolution," by Harry H. Rogers of Tulsa. E. G. McAdams of Oklahoma city was elected president of the association for the ensuing year.

THE MASSACHUSETTS BAR ASSOCIATION elected the following officers at its recent annual session: President—Arthur Lord, Plymouth; vice-presidents: Marcus P. Knowlton, Springfield; Judge John W. Hammond, Cambridge; Judge James M. Morton, Fall River; secretary—Frank W. Grinnell, Boston; treasurer—Charles H. Beckwith, Springfield; executive committee—Elisha H. Brewster, Springfield; Chandler Bullock, Worcester; Robert P. Clapp, Lexington; Walter Coulson, Lawrence; Fred T. Field, Boston; Frederick A. Fisher, Lowell; Frank M. Forbush, Newton; John E. Hanigan, Cambridge; Raymond A. Hopkins, Barnstable; Gardner K. Hudson, Fitchburg; Frank S. Lawler, Greenfield; James A. Lowell, Newton; Judge Henry T. Lummus, Lynn; John W. McAnarney, Quincy; John W. Mason, Northampton; James E. McConnell, Boston; Frank E. Milliken, New Bedford; Henry B. Montague, Southbridge; George R. Nutter, Boston; Richard W. Nutter, Brockton; Amos T. Daunders, Clinton.

VERMONT BAR ASSOCIATION.—The fortieth annual meeting of the Vermont Bar Association was held at Montpelier, Vt., on January 2 and 3. Formal addresses were delivered by President George B. Young, on "The Lawyer—His Place and Function"; by John W. Redmond, on "Efficiency in the Trial Courts"; by Walter George Smith of Philadelphia, president of the American Bar Association, on "War Legislation"; by John F. Watson, Chief Justice of the Vermont Supreme Court, on "The Supreme Court—Its Methods and Work"; by Sherman R. Moulton of Burlington, on "Framing Issues"; by M. C. Webber of Rutland, on "Appeals and Appellate Procedure"; and by John E. Sargent of Ludlow, on "What System of Courts is Best for Vermont." The election of officers resulted as follows: President—Robert Healey, of Bennington; vice-presidents—M. C. Webber, of Rutland; J. W. Redmond, of Newport; F. A. Rowland, of Montpelier; secretary—John H. Minns, of Burlington; treasurer—E. M. Harvey, of Montpelier.

THE ILLINOIS STATE'S ATTORNEYS' ASSOCIATION held its annual convention at Chicago, Ill., on December 27 and 28. Among the addresses were the following: President's address, by Lowell B. Smith, of Sycamore; "Criminal Decisions of the Past Year," by Dean H. W. Ballantine of the University of Illinois College of Law; "Co-operation of Correctional Institutions with State's Attorneys," by Judge W. C. Graves, general superintendent of the state reformatory at Pontiac; "Woman Suffrage—Its Legal and Constitutional Aspects," by Miss Florence King of Chicago; "Fighting Organized Crime," by Maclay Hoyne of Chicago; "The Draft and the State's Attorney," by Major June Smith; "Personal Experiences in the War Zone," by Dr. George P. Gill of

Rockford. The following officers were elected: President—Maclay Hoyne, of Chicago; vice-presidents—J. L. Deck of Decatur and J. E. Major of Hillsboro; secretary and treasurer—Charles E. Lauder, of Monmouth.

NEW YORK STATE BAR ASSOCIATION.—The forty-first annual meeting of the New York State Bar Association was held at New York city on January 11 and 12. The subject of the president's address, by Hon. Charles E. Hughes, was "New Phases of National Development." The annual address was delivered by Rt. Hon. Sir Frederick Edwin Smith, K. C., M. P., of London, the attorney general of Great Britain. Hon. Orrin N. Carter of Chicago, Chief Justice of the Illinois Supreme Court, presented a paper on the subject, "The Courts and the People." The afternoon session on January 12 was devoted to the memory of Hon. Joseph H. Choate, appropriate addresses being delivered by ex-Chief Justices Cullen and Parker of the Court of Appeals, former Presiding Justices O'Brien and Ingraham of the Appellate Division, First Department, John G. Milburn and ex-Judge Clearwater of Kingston. At the annual banquet, the speakers included Secretary of State Lansing, Hon. Elihu Root, the Duke of Devonshire, Governor General of Canada, the Attorney General of Great Britain, Ambassador Jusserand of France, and Ambassador di Cellere of Italy. The following officers were elected for the ensuing year: President, Charles E. Hughes, New York; vice-presidents, First District, De Lancey Nicoll, New York; Second District, Luke D. Stapleton, Brooklyn; Third District, Frank H. Osborn, Catskill; Fourth District, Charles S. Nisbet, Amsterdam; Fifth District, David F. Costello, Syracuse; Sixth District, A. H. Sewell, Walton; Seventh District, Arthur E. Sutherland, Rochester; Eighth District, Maurice C. Spratt, Buffalo; Ninth District, C. H. Young, New Rochelle. Secretary, Frederick E. Wadhams, Albany; treasurer, Albert Hessberg, Albany.

## English Notes*

LORD READING.—The advancement of the Lord Chief Justice in the peerage from a viscount to an earl further accentuates the extraordinary "record" created by Lord Reading during the last few years. In modern times, at all events, he was the first Attorney General who as such became a member of the Cabinet; he was the first Chief Justice to be created a viscount while in office, and now his promotion to an earldom, although not unprecedented, for Mansfield reached this dignity, is the first instance for considerably over a hundred years. An earldom has in the legal sphere usually been reserved for the Lord Chancellor, but even that high dignitary has not invariably received the distinction. In modern times every Chief Justice save Cockburn has been created a peer, although it is to be observed that Abbott had been several years on the Bench before he became Lord Tenterden. In view of modern legislation which has enabled the English Lords of Appeal in Ordinary to sit in the Court of Appeal, and has given them precedence according to their rank as peers, it is fitting that the head of the Common Law Courts should enjoy a rank which does not place him in the courts after the ordinary Law Lords. It will be remembered that a year or two ago, when the services of Lord Parker and Lord Sumner were requisitioned for the Court of Appeal, both took precedence in the cause list of the Chief Justice, who at that time had not attained the rank of viscount.

* With Credit to English Legal Periodicals.

THE PACIFISTS AND THE OBJECTORS.—It would seem that at last the authorities are bestirring themselves to deal with the pernicious propaganda that have been openly conducted by known persons and organizations for some considerable time, says the *Law Times*. Ample powers under the Defence of the Realm Acts and regulations exist for dealing with those responsible for these movements, and the country at large will cordially support the suppression of those whose sole object seems to be the furtherance of the enemies' political offensive. No one objects to free expression of opinions, but when attempts are made to hinder the effective prosecution of the war as a means of enforcing such opinions, such treasonable practices must be put down with a heavy hand. In this connection, it may be observed that the recent debate in the House of Lords will do much to clear the air of a lot of cant that has been current with regard to the punishments awarded to those persons who refuse to perform any military or national service. The true conscientious objectors are few in number, and may be described as those persons who hold genuine convictions based on religious or moral grounds. With these misguided people a certain amount of sympathy may be felt, and any vindictiveness towards them should be deprecated. By far the greater number of those who are now undergoing punishment are not conscientious objectors at all, but may be classed as objectors to military or national service on political, social, or personal grounds. To these persons no leniency whatever should be shown, and we are glad to see that for the future punishments awarded by courts-martial are to stand, and there will be no successive punishments. The tribunals—local, appeal, and central—have done good work separating the sheep from the goats, and very few mistakes as to category have occurred.

THE ATTORNEY GENERAL OF ENGLAND.—The correspondence between Sir F. E. Smith, K. C., the Attorney General, and the London *Times* supplies an illustration of the variance in practice between the offices of Attorney General for England and Attorney General for the United States. Sir F. E. Smith, in commenting on a statement of the *Times* that the senior law officer gave bad advice to the Shipping Controller, says: "You well knew, when you made this charge, that I could not publish the advice (if any) which I gave to the Shipping Controller." The opinions of the law officers of the Crown are confidential. They are not usually laid before Parliament, nor cited in debate, and their production has frequently been refused; but, if a Minister deems it expedient that such opinions should be made known for the information of the House of Commons, he is entitled to cite them in debate. Sir Joseph Maclay, as a Minister of the Crown, could not, or, to speak more accurately, the representatives of the department in the House of Commons of which Sir Joseph Maclay is the head, could not, in defending his conduct in this case, rely on his having followed the advice, if any, of the Attorney General, nor could the Attorney General, in the discussion in the House of Commons on the vote for his salary, as a law officer of the Crown be subject to criticism for any advice given by him on which a Minister of the Crown may have acted. The widely different position of the Attorney General for the United States is thus described by Viscount Bryce: "The Attorney General is legal adviser of the President in those delicate questions, necessarily frequent under the Constitution of the United States, which arise as to the limits of the executive power and the relations of the Federal to State authority and generally in all legal matters. His opinions are frequently published officially as a justification of the President's conduct and an indication of the view which the executive takes of its legal position and duties in a pending matter (another variance from the practice of England, where

the opinions of the law officers of the Crown are always treated as confidential). Some of them have, indeed, a quasi-judicial authority, for when a department requests his opinion on a matter of law, as, for instance, regarding the interpretation of a statute, that opinion is deemed authoritative for the officials, although, of course, a judgment of a Federal Court would upset it. His power to institute or abstain from instituting prosecutions under the Federal Acts is also a function of much moment."

SOLICITOR'S LIEN ON DOCUMENTS RECOVERED BY NEGOTIATION.—The recent case of Meguerditchian *v.* Lightbound and others (142 L. T. Jour. 393) is of interest to solicitors as illustrating the limitations on a solicitor's lien. One Zervudachi instructed the defendants to recover some documents, the title deeds of some concessions in Syria, from one Bergheim, and they incurred heavy costs on Zervudachi's behalf. Zervudachi became bankrupt and died, and the plaintiff, the syndic or trustee in his bankruptcy, instructed the defendants to recover the deeds. The defendants were successful in recovering the deeds from Bergheim's executors, and claimed to have a lien on them for the costs incurred on the instructions of the plaintiff, and also for the costs incurred on the instructions of Zervudachi. The former claim was admitted, the second claim was denied by the plaintiff, who sued to recover the deeds from the defendants. The defendants' claim, therefore, was for a lien on documents which they had not recovered while acting for Zervudachi, but had recovered while acting for the plaintiff, the trustee in the Egyptian bankruptcy of Zervudachi. The defendants' contention was that, because the plaintiff instructed them to take proceedings to obtain the documents, he must be deemed to have accepted and taken on the benefit of the negotiations that had previously taken place, and that the lien extended to all the costs incurred by Zervudachi. It was contended that there was an analogy between the present case and cases where there are legal proceedings to establish a claim, and where, after the proceedings have been continued for some time, there has been a change of interest on a bankruptcy, and the trustee in the bankruptcy intervenes and takes up the litigation at the point where the bankrupt left it. The Court of Appeal, however (affirming Mr. Justice Rowlatt), held that there was no such lien where the solicitors had recovered documents by mere negotiation and not by legal proceedings; nor could any authority be found in favor of the contention. The charging order which can in certain circumstances be obtained under the Solicitors Act 1860 on property recovered or preserved is limited to property recovered or preserved by legal proceedings, and confers no lien in respect of property recovered or preserved by negotiation only. Consequently, although the defendants had a lien on the mass of documents which came into their possession on the instructions of Zervudachi, which had no financial value, and a lien on the valuable documents which came into their possession on the instructions of the plaintiff for the costs incurred on behalf of the plaintiff, they had no lien on the valuable documents for the costs incurred on behalf of Zervudachi.

COMPENSATION DURING PARTIAL INCAPACITY FOR WORK.—A different view of the true construction of section 3 of the first schedule to the Workmen's Compensation Act 1914 (6 Edw. VII, c. 58) from that expressed by Lord Cozens-Hardy M.R., and Lord Justice Scrutton was taken by Lord Justice Warrington in the recent case of Heathcote *v.* Haunchwood Collieries Limited (116 L. T. Rep. 100). But, on appeal to the House of Lords, it was his Lordship's dissentient judgment that met with their approval, and not the decision of the majority of the court. The learned judge had dwelt on the findings of the learned County Court judge. And in particular he had intimated his assent to the method of compensation adopted by him for ascertaining what was the weekly payment to be awarded. The House of Lords were of opinion that there was no finding that the injured workman had acted otherwise than reasonably in accepting a situation as a driver at 30s. per week instead of as a packer at 7s. 6d. per day. The award could not, they thought, be disturbed on the surmise that the reasons for it were wrong. The reader may find it convenient to be reminded that the section above referred to directs how the weekly payment by way of compensation is to be determined in the case of partial incapacity for work on the part of a workman who has suffered "injury by accident arising out of and in the course of" his employment, within the meaning of section 1 of the Act. The weekly payment, it is prescribed by section 3 in the first schedule to the Act, "shall in no case exceed the difference betwen the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning, or is able to earn, in some suitable employment or business after the accident." The majority of the learned judges of the court considered that the learned County Court judge had failed to assign a proper value to the words "or is able to earn" in the section. Their Lordships were of opinion that if an injured workman is found by the learned County Court judge to be "able to earn in some suitable employment or business" a certain sum in excess of that which he has actually succeeded in acquiring, effect must be given to that finding. In other words, the injured workman must do the best he can to get the most wages possible, provided that the employment or business is a suitable one, and thus save his employer's pocket as far as possible. Had it not been that the House of Lords came to a contrary conclusion—actuated as they were by the findings of the learned County Court judge—there would have appeared to be little to take exception to in the decision of the Court of Appeal. But the House of Lords bore in mind their decision a short while previously in Woodilee Coal and Coke Company Limited *v.* M'Neill (noted 143 L. T. Jour. 393). Their Lordships there held that it was right to take into account, as an element in arriving at whether the maximum weekly payment should be given or not, what the workman would have been "able to earn" if the accident had not taken place.

THE WEARING OF THE HAT.—The death of Lord Forester will recall to mind the fact that he enjoyed the hereditary privilege, conferred on his ancestor by Henry VIII., of wearing a hat in the Royal presence. Lord Kingsale, the premier baron of Ireland, has a similar privilege, conferred on his ancestor by King John. The wearing of the hat has led to some remarkable incidents in Parliamentary and legal history. To give a few illustrations. In 1832 a difficulty presented itself in the case of Mr. Pease, the first Quaker member returned to the House of Commons. He objected from conscientious motives to take off his hat in the chamber of the House. It is a rule that the hat might be kept on when a member remained sitting, but must be taken off when moving in the House. Some friend of Mr. Pease, to obviate the difficulty, instructed the doorkeper to gently remove his hat and retain it till he quitted the House. In the course of a year or two he put it on for himself. The controversy as to whether Charles I. at his trial in Westminster Hall should be covered or uncovered was decided by the arrangement that both the King and Bradshaw (whose hat is preserved in the Ashmolean Museum at Oxford) should be covered. In the celebrated case of Sir John Fenwick in 1697, when one of the two witnesses required to substantiate a charge of treason was prevailed on by the wife of the accused to

quit the kingdom, resort was had to a Bill of Attainder, which became law, under whose provisions Sir John Fenwick suffered the penalties of high treason. The severity of the course pursued in his case is believed to have been due to his studied insults to Queen Mary in keeping on his hat ostentatiously in her presence. At the Scottish Bar the privilege, now never exercised by the Lord Advocate, in being covered when pleading before the judges has its origin in the claim of this privilege made by Lord Advocate Hope in the reign of Charles I., whose two sons were members of the Scottish Judiciary. Lord Abingdon, who was tried, convicted, and sentenced for criminal libel before Lord Chief Justice Kenyon, claimed to be entitled to wear his hat at the trial, a claim which was peremptorily refused. Some thirty years ago, at the assizes at Limerick, a Quaker gentleman was wont to create a mild sensation by keeping on his hat in court till by the order of the judge it was removed by a constable. A going Judge of Assize gave direction that no notice should be taken of the gentleman in the event of his wearing his hat in court, whereupon he of his own accord took the hat off, and did not obtrude himself again on the notice of the court. Chief Justice Whiteside in his Early Sketches relates the following anecdote of Lord Chief Baron O'Grady (Viscount Guillamore), who presided over the Irish Court of Exchequer from 1803 till 1831: "Sir William Steamer, a portly, consequential alderman of the Corporation of Dublin, when sitting as foreman of a jury, interrupted the Chief Baron at a critical moment by vehemently protesting he could no longer endure the intensity of the cold, and begging permission to wear his hat. His Lordship, casting an affectedly sympathizing glance on the half-frozen baronet, dryly replied: 'Sir William, it is not usual for gentlemen to wear their hats in courts of justice, but if a wig would answer, I am sure members of the Bar will kindly accommodate you with a good fit.'"

PUBLIC PROPERTY AS WAR BOOTY.—The statement that in the event of a hostile occupation of Venice the Austrians, in response to an appeal from the Vatican, have agreed to spare that city will direct attention to the fact that it is now generally conceded that works of art and the contents of museums, even though public property, are not to be seized as booty. They must be protected, not removed. The Hague Conference (Second Convention, art. 56) declared that the property of the municipalities, that of religious, charitable, and educational institutions, and works of art and science, even when State property, shall be treated as private property, while all serious destruction or intentional damage done to such institutions, to historical monuments, and works of art or science is prohibited. Public lands and buildings with their incomes are subject to use for public purposes by the occupying army, but not to injury or destruction, use in their case being a different thing from capture. Parks, monuments, archives, and the like, which are not prizes of war, are to be protected and administered. According to the rule adopted at The Hague (Hague Second Convention, art. 55), the occupying state shall be regarded only as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile Government and situated in the occupied country. Such state must protect the corpus of these properties and administer it according to the rules of trusteeship. As regards the doctrine, now accepted as a principle of international morality, that works of art, libraries, and museums when in states in hostile occupation are to be protected, not removed, it must be remembered that Venice in her glory was adorned with foreign spoil, and that Napoleon during his campaigns accumulated in the Louvre the choicest treasures of Europe, particularly of Italy. The treaty which restored Louis XVIII. left these entirely undisturbed, and the allies do not seem to have thought of them until the second occupation of Paris in 1815, when Napoleon, the only person who could have resisted their reappropriation, was a prisoner. Then it was that Wellington declared this "spoil to be contrary to the practice of civilized warfare," and with Blücher held that the allies should restore all such acquisitions to their original owners. But when the effort was made to give effect to that resolve by the forcible removal of such articles from the Louvre, a doctrine kindred to cy-pres was invoked in order to enable any one of the allies who had then absorbed the original owner to appropriate on return all works of art belonging to him. Wellington seems to have rested the removal of these treasures more on the ground of giving France a great moral lesson of the strength of united Europe than on principle of any kind. Before the establishment of the principle that works of art, libraries, and museums in hostile occupation are to be preserved and protected, not removed, the love of literature often led to the appropriation of libraries by the conqueror. In the Thirty Years' War even Gustavus Adolphus, after Wurzburg was stormed, sent the cathedral library to Upsala by way of reprisals for the taking of the more precious library of Heidelberg to the Vatican, and at a later day he made Oxenstierna a present of that at Mayence, with the result that it was lost in the Baltic with the ship in which it was embarked.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.—The speech of the Lord Chancellor at the Guildhall Banquet in November, in response to the toast of His Majesty's judges, was delivered at a late stage of the proceedings, and was, in the necessity of things, overshadowed by the important political pronouncements of Earl Curzon and Mr. Bonar Law as Leaders of the House of Lords and Commons respectively and members of the War Cabinet. Lord Finlay, however, directed attention to a matter of great constitutional interest as illustrating the position of the Crown as outward and visible representative of the majesty of the state and of the union under one head of the Dominions, Colonies, and Dependencies which, with the mother country—the United Kingdom—constitute the British Empire. The Lord Chancellor suggested that anyone who desired to realize that union should look in at a sitting of the Judicial Committee of the Privy Council as a court to advise the Crown in the exercise of the prerogative of Fountain of Justice in decisions on appeals from British courts beyond the seas. Whatever may be the law as to the power of the Sovereign to establish new courts of justice in England by charter—a power which, if it exists, is never exercised or likely to be exercised except under provisions of Acts of Parliament—it is the undoubted prerogative of the Crown to establish courts of justice in any possessions which it may acquire beyond the realm either by conquest or by settlement, and an appeal lies from such courts to the Sovereign unless it is taken away by statute or by charter. By 3 & 4 Will. IV, c. 41, all appeals "from various courts of judicature in the East Indies and in the plantations, colonies, and other dominions of His Majesty abroad" were to be heard before a body called the Judicial Committee of the Privy Council, which was constituted by this Act in place of a committee of the whole Privy Council by which it had up till that time been customary (as the Act recites) to hear such appeals. The judicial authority, civil and criminal, of the Council or Star Chamber, being used oppressively for political purposes, was destroyed. After its destruction, however, the authority of the Sovereign extended itself over a vast Empire, including the whole of India, a great part of North America, Australia, New Zealand, the Cape, and many other places. The ancient

prerogative of the Crown as Fountain of Justice was held to vest in it the ultimate appeal in all cases, civil and criminal, from all courts in these vast territories, and a Committee of the Privy Council, which is the direct descendant of the old Curia Regis, is to this day the organ by which that prerogative is administered. Apart from limitations imposed by statute, which have received the assent of the Crown in Council or the Crown in Parliament, the King may by virtue of the prerogative review the decisions of colonial courts, civil and criminal, and of courts created under a treaty with a foreign Power exercising jurisdiction in a foreign country. A judgment of the Judicial Committee of the Privy Council is a statement at length of the reasons which determine them in "humbly advising" the King to give effect to their decisions. When the report has been submitted to the King and approved by him at a meeting of the Privy Council, an Order of Council is made reciting the report and adopting it as the judgment of the King in Council. The Judicial Committee of the Privy Council is, as the Lord Chancellor has indicated, an object lesson of the unity of the component parts of the Empire under the Crown in the working of a system which has been so happily termed by General Botha in his speech, when the guest of the Houses of Parliament on May 18, "an hereditary republic."

CAPACITY OF ENEMY PARTNER TO SUE FOR HIS OWN BENEFIT.—In the recent case of Speyer Brothers *v.* Rodriguez a difficult point of law came before the Court of Appeal. Mr. Justice Peterson had set aside a judgment on the ground that one of the six members of the plaintiff firm as constituted at the time of the accrual of the cause of action (Feb. 1914) was, at the time of the issue of the writ (Jan. 1916) and of the judgment in default of appearance (July 1916), an alien enemy and not entitled to sue. The plaintiff firm sued in the firm name. The enemy partner was entitled on dissolution of the partnership only to one-fortieth of the assets, and was under a liability to the firm in a sum greater than £29,722, the amount for which judgment had been given. According to the decision in Stevenson's case (115 L. T. Rep. 594; (1917) 1 K. B. 842) the partnership became dissolved on the outbreak of war, but that decision does not allow friendly partners to value an enemy partner's interest in the partnership at the outbreak of war and carry on the business in the future without any further regard to his interests, but the enemy partner, apparently, after the conclusion of peace, will be entitled to a share in the profits earned by his share in the capital and good will of the partnership. The question was whether an alien enemy could sue singly or jointly for his own benefit. Lord Justice Bankes was of opinion that the case should be treated as if the objection had been taken before, instead of after, judgment, while Mr. Justice Sargant thought the defendant had weakened his case through his year's delay. It was suggested that the plaintiffs ought to have made the enemy a defendant, but the answer to that was whether as plaintiff or defendant he would be equally entitled to the fruits of the judgment. Again, it was suggested that the plaintiffs ought to have got the enemy's share of the amount recovered vested in the custodian of enemy property, but an answer to that was that, in view of the enemy's liabilities to the firm, there was nothing to vest in the custodian. Lord Justice Pickford, who dissented and held that the order setting aside the judgment should be affirmed, was of opinion that Candilis *v.* Victor (33 Times L. Rep. 20) was an authority binding on the Court of Appeal. There, however, two partners out of three were enemies, and there was nothing in the report to show whether their interests in the partnership were large or small. In the present case the enemy was not suing as executor, or as a bare trustee (though it was argued he was suing en autre droit), and therefore the point was neatly raised whether an enemy could sue for his own benefit, small though his share of the amount recovered would be. Lord Justice Bankes and Mr. Justice Sargant took the view that the order setting aside the judgment ought to be discharged, and the case sent back to the master on the general merits, the defendant having alleged that his default in appearing was due to a bona fide mistake. Their Lordships were of opinion that it was more contrary to public policy that the friendly partners should be unable to get in their debts than that the enemy should be enabled to obtain a proportionately trifling benefit after the war. Mr. Justice Sargant felt the difficulty created by Candilis *v.* Victor (*sup.*), but pointed out that that case did not seem to have been argued or considered on the same lines as the present, and very little authority was there referred to. It was true, added his Lordship, that recent legislation had provided for the making of vesting orders which might enable difficulties in liquidating partnerships with alien enemies to be overcome; but these were merely extra facilities whose creation was no sufficient reason for interpreting the previous law so as to result in an impasse.

GIFTS BY WILL OF "CASH."—It must be conceded that, according to the dictionaries, the word "cash" is a stricter term than "money." According to Sir James Murray's Oxford Dictionary, "money" may mean "property or possessions of any kind, viewed as convertible into money or having value expressible in terms of money;" but no such wide definition is given of "cash." The decisions on the meaning of the word "money" are numerous, but the cases on the meaning of the word "cash" appear to be rare. One of the earliest was Beales *v.* Crisford (13 Sim. 392). There the language of the will was "Observing that Francis Beales and his family are my residuary legatees for all but cash or moneys so called." The testatrix's estate consisted in part of cash in her house and at her bankers, long annuities, Columbian bonds, and a promissory note dated prior to her will, and payable to herself or order. It was decided by Vice-Chancellor Shadwell that Francis Beales and his children took the note, annuities, and bonds as joint tenants, those articles being neither "cash or moneys so called." It will be observed that in that case there was a gift of residue, which would tend to restrict the meaning of the words "cash or moneys." In Nevinson *v.* Lennard (34 Beav. 467) it was held by the then Master of the Rolls (Sir John Romilly) that the word "money," coupled with the word "cash," was confined to money strictly and properly so called. The question turned on the construction of several testamentary instruments. By the second of them the gift was "when all my just debts and legacies are paid, without the smallest deduction arising from any sort of taxes, I give the residue of all my money, either in my bankers' hands or elsewhere, if any such cash be remaining, in trust for, &c." The Master of the Rolls said: "There is no doubt that, although the word 'money,' standing by itself, is confined to the proper meaning of that word, yet if it be given after a direction to pay debts, legacies, and funeral and testamentary expenses, or with any words which denote an intention on the part of the testatrix to dispose of the whole of her estate, it will be construed as synonymous with property, and in the popular and inaccurate sense of the word 'money.' " His Lordship said that if the second testamentary instrument stood alone he should have been disposed to hold that the word "money" meant a general residuary bequest; but the interposition of the word "cash" threw a doubt on the point, and, taking the whole of the testamentary dispositions together, he thought that the word "money" must be confined to money strictly so called. *In re* Boorer (deceased); Boorer *v.* Boorer (W. N. 1908, p. 189) it was held that a gift of "all cash in the house, or at my bankers,

at my death," only included money on current drawing account, and such money on deposit as was payable on demand and withdrawable without notice. *In re* Windsor; Public Trustee *v.* Windsor (108 L. T. Rep. 847) the facts were shortly as follows: A testator, whose will was dated in 1908, and who died in 1912, left his wife "all cash in house," and to his wife and daughter in equal shares "all cash in bank, consols, shares, and savings bank deposit." He made no residuary bequest. It was held by Mr. Justice Warrington (as he then was) that certain post office money orders in the house at his death passed to his wife as "cash in the house." In a recent unreported case where the gift by a testator to his widow was of furniture and "cash in hand and elsewhere," subject to the payment of certain legacies, it was held that the whole residuary personal estate passed to her, there being no other residuary gift in the will. Although, therefore, the word "cash" by itself may have a more restricted meaning than "money," the word "cash," as explained by the context, may be sufficient to pass the residuary personal estate. It may be useful to add that in those cases evidence is admissible to show of what property the testator was possessed, at the date of his will, as well as at the date of his death, but only as evidence of surrounding circumstances (see *Re* Skillen; Charles *v.* Charles, 114 L. T. Rep. 692; (1916) 1 Ch. 518).

## Obiter Dicta

AFTER THE CALVES.—Chase *v.* Veal, 83 Tex. 333.

TWO IRON MEN.—Matty *v.* Sampson, 64 N. Y. App. Div. 1.

AVIATION SLACKERS.—Figuers *v.* Fly, (Tenn.) 193 S. W. Rep. 117.

RACE SUICIDE.—Storke *v.* Storke, 132 Cal. 349, was an action for an absolute divorce.

AFTER HIM.—Huntress *v.* Hanley, (Mass.) 80 N. E. 946, involved the validity of an antenuptial agreement.

PAINFUL.—McCreary *v.* Coggeshall, 74 S. Car. 42, was an unfortunate family quarrel over the title to certain "lands, situate, lying and being on Belly Ache."

A ROTTEN SHAME.—Rott *v.* Goehring, 33 N. Dak. 413, was an action by Mrs. Rott to recover damages from Helen Goehring for alienating Mr. Rott's affections.

NOT SWEET ON THE DRAFT.—U. S. *v.* Sugar, (Mich.) 243 Fed. 423, and U. S. *v.* Sugarman, (Minn.) 245 Fed. 604, were prosecutions for obstructing conscription.

DELAWARE CHARTERS
IMPORTANT AMENDMENTS
TO THE DELAWARE LAW (March 20, 1917).
STOCK WITHOUT PAR VALUE
The most modern and scientific method of corporate organization. Write for full particulars of this and other important amendments.
REVISED DIGEST (4th Ed.) free to lawyers on request
CORPORATIONS ORGANIZED AND REGISTERED.
LAW AND FORMS FREE.
Corporation Company of Delaware
604 EQUITABLE BUILDING, WILMINGTON, DEL.

IT DOES AND IT WILL.—"The Constitution, no doubt, follows the flag. But the American flag does not wave over the continent of Europe."—See Moody *v.* Hagen, 36 N. Dak. 471.

FAILED TO SCORE.—In Points *v.* Nier, 91 Wash. 20, although the plaintiff may be said to have started with a few points in her favor, she did not come anyways near winning.

JUDICIAL NOTICE.—In Hoy *v.* Gorst, 79 Oregon 617, the court begins its opinion thus: "This is an action in replevin to recover a Ford machine, called in the complaint an automobile."

DEPENDS ON THE SEX OF THE AGENTS.—"The public cannot, like an individual, be always on the watch. If they employ agents, those agents may sleep, or, what may be worse, they may wink; and how can the public watch the winks?"—Per Cranch, C. J., in U. S. *v.* Watkins, 3 Cranch (C. C.) 441.

HARD TO ESCAPE.—Section 28 of Chapter 68 of the New York Consolidated Laws, known as the City Local Option Law, provides as follows: "Any person . . . who, by treating or giving liquor or anything else of the same or a different kind . . . attempts to influence any one . . . shall be guilty of a misdemeanor."

THEY NEVER KNEW IT!—"The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact."—Per Holmes, J., in Southern Pacific Co. *v.* Jensen, 244 U. S. 222.

FROM DICKENS' REPORTS.—"Clearly this structure cannot be made a tent merely by calling it a tent, even though touching a matter to an extent analogous, one Squeers of Dotheboys Hall sapiently observed that 'there is no law to prevent a man from calling his house a hall if he wants to do so.' [Nicholas Nickleby, reported by Charles Dickens.]"—Per Faris, J., in St. Louis *v.* Nash, 266 Mo. 532.

A BOLSHEVIKI UPRISING.—In People *v.* Gukouski, 250 Ill. 231, a prosecution for murder committed in the city of Chicago, Gukouski, Nogawischi, Krolikowski and Karcz were the defendants; Blonski was the employee of the murdered man; Kandzia, a police captain, and Heilinski, a police sergeant, figured in the case; and Pawlowski, a policeman, was one of the state's witnesses.

A SAPIENT COURT.—In Gibson *v.* State, 193 Ala. 12, counsel for the state in his argument to the jury said: "I understood, and no doubt the jury did, that what the witness Simmons said about what the defendant said that the defendant had done what he came there to do." Referring to this statement, the Supreme Court remarked: "That it was highly prejudicial cannot be questioned." After reading the statement over and over again, and then some, we take off our hats to the Supreme Court of Alabama.

ANENT CONNUBIAL ARGUMENT.—In Berry *v.* Berry, 115 Iowa 545, an action for a divorce on the ground of cruel and inhuman treatment consisting in part of an addiction to profanity on the part of the husband, the court remarked: "It is suggested by his counsel that appellant's profanity was 'argumentative' only, and therefore of no weight as evidence. Upon the Hibernian theory that the riot at Donnybrook Fair was an 'argument with sticks,' counsel's euphemistic characterization of his client's conduct may be adopted, but it should be remembered that in all 'arguments' of that nature somebody is liable to receive hurt."

THE FLORAL EMBLEM OF ALASKA.—On April 28, 1917, the Territorial Legislature of Alaska passed the following statute:

*An Act*

DESIGNATING and declaring the forget-me-not to be the Territorial and floral emblem of Alaska.

A little flower blossoms fo th on every hill and ale,

WHEREAS, throughout her more than one half million square miles of territory, stretching from the Pacific to the Arctic Ocean and from Canada's border to Bering Sea, Alaska has a wild flower which grows on every hill and in every valley; and,

The emblem of the Pioneers upon the rugged trail;

WHEREAS, this flower is emblematic of the quality of constancy, the dominant trait of the intrepid pioneers, who, in spite of almost insurmountable obstacles and insufferable hardships, have opened for development a nation's treasure house; and,

The Pioneers have asked it and we could deny them not;

WHEREAS, the Grant Igloo of the Pioneers of Alaska have indorsed this floral gem as the Territorial flower of Alaska,

So in thinking for an emblem
For this empire of the North
We will choose this azure flower
That the golden days bring forth.
For we want men to remember
That Alaska came to stay,
Though she slept unknown for ages]
And awakened in a day.
So, although they say we're living
In the land that God forgot,
We'll recall Alaska to them
With our blue forget-me-not.
(DARLING)

Therefore,
Be it enacted by the Legislature of the Territory of Alaska:

So the emblem of Alaska is the blue forget-me-not.

Section 1. That the wild native forget-me-not is hereby made, designated, and declared to be the Territorial flower and floral emblem of the Territory of Alaska.

Approved April 28, 1917.

A WAYWARD HORSE.—In the City Court of Watertown, N. Y., not long since, an action was brought to recover the purchase price of a horse. The defendant was evidently not a David Harum when it came to buying horses, but in the matter of ingenuity in finding a loophole through which to escape from a bad bargain, he seems to have had David backed off the map. His answer to the complaint against him read as follows:

"Now comes Joseph Mitchell, defendant, and for an answer alleges, upon information and belief:

First: That he is totally and absolutely unfamiliar with the science of horse-breeding and horse-trading and has no knowledge of horses, except that he can tell a horse from a cow.

Second: That on or about the 10th day of August, 1915, the plaintiff herein came to defendant and stated that he had a very valuable horse which would be just what defendant needed in his business, the same being then and there the selling and delivering at retail to the various inhabitants of the city of Watertown and of the county of Jefferson who would purchase the same of him, ice cream, and the same then and there required and necessitated the use of a horse, or other means of locomotive power, to transport and deliver the same to and at the various residences of the citizens aforesaid; plaintiff further then and there stated and represented to defendant that said horse was of quiet and gentle disposition, tractable, and would stand on the streets and highways of said city and county and the various villages of the latter, without hitching, and was at all times docile and gentle, both to humans and to individuals of his own species, of both sexes; that said horse did not exceed in age ten summers. That nevertheless, said horse is upwards of thirteen years of age, is neither quiet nor gentle, is prone to attack and quarrel with all members of his own species of masculine gender, and is wayward in pursuit of feminines of said species, and that said characteristics are predominant when said horse is in the harness, and said horse is unable and unwilling to attend to said business and remain standing unhitched in said streets and highways, but on each occasion, when therein left in pursuance of said business, gives way and yields to said tendencies towards members of his own species, as aforesaid, and defendant alleges that by reason of statements so made by plaintiff as aforesaid, and by reason of the facts aforesaid, plaintiff misled and deluded defendant, to his injury, and defendant now brings said brown horse into court and makes a tender of him to plaintiff and demands of plaintiff that he return to defendant said horse so taken and cozened from defendant by plaintiff as described in the complaint, and that the complaint be dismissed with costs.

JOSEPH MITCHELL,
Defendant."

## Correspondence

REFUSAL OF EXTRADITION.

*To the Editor of* LAW NOTES.

SIR: It is my honest opinion that you do not state in plain words the law in your editorial in current LAW NOTES on the incident of Gov. McCall's refusal to honor the requisition of the Governor of West Virginia. You even use these harsh words: "Is itself equally without warrant in the law." Quoting from another writer I will say: "The words 'it shall be the duty' were interpreted by Chief Justice Taney as merely declaratory of a moral duty and not as mandatory and compulsory. The Governor is therefore under a moral obligation to surrender criminals, but he may use his discretion in the matter." Now, Mr. Editor, to use your own words I will say that if "the cold legal facts" are that a Governor is only under a moral duty to honor the requisition and has the right to use his discretion, your editorial does not express the correct law and does use harsh language towards the Executive of Massachusetts. Please pardon this criticism from a Western country lawyer, but I do not like to see even a Governor dealt unfairly with, even by a law writer, unless the said writers stick to the "cold legal facts."

CHARLES SUMNER MACOMBER.

Ida Grove, Iowa.

"He serves his client best and dignifies the profession most who proceeds most directly to lay the real merits of the cause before the court and jury and appeals to their judgment, depending upon the justice of the case."—Per Marshall, J., in Loguidice *v.* State, 160 Wis. 18.

"I have scant patience with any person who advocates a disregard of the great principles and precedents which have been established through many years of experience, are the result of the combined wisdom of many generations of men, and stand for the safeguarding and protection of the rights and liberties of the people. On the other hand, I have little more patience with mere technicalities, and with such narrow constructions of laws relating to procedure that the following of such constructions tends more to the obstruction of justice than to the furtherance of its ends and purposes." Per Sessions, J., in U. S. *v.* Rockefeller, 221 Fed. 464.

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WATSON E. COLEMAN,
PATENT LAWYER 624 F Street, N. W., Washington, D. C.

# Law Notes

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### Limitations on the War Power.

IN a recent number of the California *Law Review* Professor Ballantine of the University of Illinois takes issue with the contention of Mr. Henry A. Forster as expressed in several magazines, including LAW NOTES (Sept., 1917), that the jurisdiction of the military authorities extends to the trial of enemy spies and sympathizers within our borders. Prof. Ballantine's conclusion is that "as far as American authorities go, the prosecution and punishment of citizens suspected of conspiracy, sedition, disloyal practices, and of treason itself, on loyal territory in time of war, belong solely to the tribunals of the law and not to military commissions or courts-martial. The exercise of martial law over citizens is restricted to those places which are the theater of war and to their immediate vicinity." It may be that as long as the decision in Ex parte Milligan (4 Wall. 2) remains the law of the United States that view is well founded. Few persons who are alive to the necessities of the present occasion will view this conclusion otherwise than with regret. Our criminal courts are far from being the most efficient of our governmental instruments. The ordinary criminal is quite willing to gamble on finding a loophole of escape in some technical omission in the indictment or some trivial lapse of the trial judge. Is it on this sword of lath which cannot strike terror to the sneak thief or the "hold-up man" that we must rely for protection against the German spy system? True the federal courts have shown much more of capacity for administering the criminal law than those of the states, but the fact remains that our judicial system was not designed as a weapon of war and cannot efficiently serve as such. For example, a United States district judge recently granted an injunction against the exclusion of a periodical of seditious character from the mail. His action was promptly reversed by the Circuit Court of Appeals. But had the case been of a criminal nature the error would have been beyond repair and a seditious agitator would have gone unwhipped of justice.

### The Milligan Case.

WHILE the decision in Ex parte Milligan probably prevents the military trial of spies and enemy sympathizers in our own land while the courts are open, it is by no means certain that the decision would be followed at the present time. It was rendered in 1866, after the dangers of war were passed, when the principal concern was to restore the routine of peace and knit up the broken bonds of the Union. The prohibition of military trials when the courts are open is not found in terms in the Constitution but was read into it by judicial construction. Four justices out of nine maintained that Congress could authorize just such trials, and concurred in the decision only because Congress had not done so. The decision as to the constitutionality of trial by military commission therefore not only rests on the narrowest possible majority but is in strictness dictum. The present Supreme Court has on more than one occasion recognized that "time makes ancient good uncouth." Wars were formerly fought between armies in the field and there was room for the contention that the war power extended only where hostilities were rife. But, as has often been declared, the present war is between peoples, and there is no spot in the United States which is not in a real sense within the theater of war. As was well said in a court of one of our allies (*Rex* v. *Vine St. Police Station,* [1916] 1 K. B. 268): "This war is not being carried on by naval and military forces only. Reports, rumors, intrigues play a large part. Methods of communication with the enemy have been entirely altered and largely used. I need only refer to wireless telegraphy, signalling by lights, and the employment on a scale hitherto unknown of carrier pigeons. Spying has become the hall-mark of German 'kultur.' In these circumstances a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movements of submarines and Zeppelins —a far greater danger, indeed, than a German soldier or sailor." If the question comes before the court during the present war it is very probable that as a shelter pit for traitors Ex parte Milligan will cease to be habitable.

### A World Court.

THE general agitation for some means whereby to avert a repetition of the present world conflict has taken a concrete form in the plans for a world court presented to the convention of the New York State Bar Association. The convention took on an international aspect by reason of the attendance of the Attorney General of Great Britain, the Governor General of Canada, and the Ambassadors of France, England, Italy, Japan and Belgium. The essential features of the plan submitted by the committee are as follows:

The contracting parties agree to submit to the international court to be formed all disputes between them of a justiciable nature, provided they have not been adjusted by diplomacy, or arbitration, and agree to submit non-justiciable questions to the council of conciliation.

They agree not to declare war or begin hostilities against another state of the league until any question in dispute has been submitted for inquiry and hearing, and until the decision of the court or the recommendation of the council shall have been made, or until the time for making such decision or recommendation shall have elapsed; and if the decision or recommendation has been made within that time a declaration of war must be withheld another six months.

They agree to use their economic and military forces against any state of the league declaring war or beginning hostilities in violation of the convention.

The plan provides for an international council of members chosen by the parties to the convention, each of the great Powers to have three members, the other parties one.

Injunctions of the council enjoining a State from committing objectional acts pending an inquiry shall be supported by the economic or military forces of the league.

No action will of course be taken until the conclusion of the present war, but at that time some agreement along the lines indicated will undoubtedly be had. It is particularly gratifying that those concerned in bringing about international conciliation have passed beyond the stage represented by the Hague Convention and its "scraps of paper." A world court not backed by the military power to compel obedience from the most ambitious war lord will never be anything more than a snare and a delusion. Many and grave problems must arise in connection with the operation of such a court. Serious possibilities of political coalition against some particular nation are not to be ignored. No plan can be formulated which will always work well and justly. But contemplating the present spectacle of the alternative, these possibilities seem slight in comparison, and before the recollection of the war has grown dim it is to be hoped that most of the initial difficulties of the world court will have been solved.

#### War and Juvenile Delinquency.

IN all the belligerent countries a notable increase in juvenile delinquency has been noted. The London *Times* of Nov. 8, 1916, quoted statistics showing an increase of 50% to 75%. To a considerable extent this is doubtless due to the fact that many homes are broken by the absence of the father. But the probation officer of the juvenile department of the Municipal Court of Chicago reports that between May, 1916, and May, 1917, delinquency within his jurisdiction increased more than 50%. Of this report it has been well said (Mr. Robert Gault in *Journal of Criminal Law and Criminology*, Jan., 1918): "As compared with the year preceding the distinguishing feature of the one referred to is a series of exciting events of war, which are vividly pictured in the daily press, in the lecturer's story and in the moving picture. These, it must be assumed, stimulate the imagination and the spirit of adventure in the young and so contribute to the swelling tide of delinquency. If this is correct, obviously there is need for counter irritants. To supply them is to render a national service of such generous proportions that it should solace one who is unable to enter more directly into war work, and stimulate the ingenuity of the best personalities. The success of teachers, scoutmasters, play-ground directors, probation officers, etc., in meeting their responsibilities in these times will spare us the embarrassment of wasted energy at home and help to assure progress in all aspects of public welfare after the war." The possibilities of preventing a large measure of the delinquency which results from broken homes is shown by the fact that the proportion of delinquents among children who have lost one parent is apparently much higher than that among orphans, the obvious explanation being that substantial provision is made for the care and education of orphans, while so long as a surviving parent can provide for a child's physical necessities the community takes little thought of his moral welfare.

#### Another Explanation.

MR. CECIL LEESON, an English expert on social welfare work, is reported as having said recently, referring to conditions in Great Britain:

"The reasons for the general increase are that there has been an abnormal demand for boy labor; abnormally high wages have been paid small boys suddenly released from school discipline to go to work; the police force has been diminished; street lighting has been restricted; enforcement of the school attendance laws has been relaxed; thousands of children have been turned out of school by the use of school buildings for military purposes; and home discipline has been slackened, while at the same time club settlement and church work, evening classes, and all general welfare work have been interrupted, with the natural result that children have been running wild."

Following this diagnosis of the cause of augmented delinquency Mr. Leeson said:

"These are some of the things we must avoid here in the United States. England has found her promiscuous breaking down of labor laws at the start of war did not pay. Her child workers are reported as 'drawing on their strength,' and the government reports that 'munition workers in general have been allowed to reach a state of reduced efficiency and lowered health, which might have been avoided without reduction of output by attention to the details of daily and weekly rest.' We must profit by the experience of other belligerent countries. We must not allow our school system or our child-protective laws to be broken down. We must continue to the very last moment our clubs, settlements and other welfare organizations so that the little children of America, our future citizens, whose lives we should conserve now more than ever, may be the last to feel the stress of war."

The matter is one worthy of close consideration by the legal profession, whose members are leaders not only in the legislative halls but in the affairs of the average community.

#### Postponing the Steel Trust Cases.

THE action of the Supreme Court in postponing, at the request of the Attorney General, the consideration of the proceedings against the United States Steel Corporation has apparently met with the approval of every one except the few, who, having convinced themselves that the country is going to the dogs, twist every event into a vindication of that belief. The operation of the steel plants at their maximum capacity is among our most urgent national needs, and it is no time to "stop the plow

in order to catch a mouse." Moreover, on no possible assumption can the postponement do any harm since at the present time practically the entire output of the Steel Corporation is taken by the government at prices fixed by it, and it does not make a particle of difference to the public whether the company is a "good" trust or a "bad" one or is perchance no trust at all. All that concerns the public during the duration of the war is that it shall continue to turn out sorely needed supplies and munitions with the least possible disturbance of its activities. The courts have frequently been accused of sacrificing the substance to the form, but the incident under consideration would seem to show that the judicial department is not so badly bound up with red tape as some others that might be mentioned. Had the consent of the prosecuting officer not obviated the necessity of giving a legal reason for the continuance, such a reason might well have been found in the fact heretofore adverted to that under existing circumstances the entire controversy is academic. On that ground the court refused in *U. S.* v. *Hamburg-Amerikanische, etc., Gesellschaft,* 239 U. S. 466, to consider, after the outbreak of the war, a case involving only the question whether an unlawful combination existed between certain British and German steamship lines.

#### The Super Tax.

IT needs only a fair understanding of the subject to bring public sentiment into full accord with the protest of the American Bar Association against section 209 of the war revenue act, known as the super tax provision. The provision reads as follows:

"That in the case of a trade or business having no invested capital, or not more than a nominal capital, there shall be levied, assessed, collected and paid, in addition to the taxes under existing law and under this act, in lieu of the tax imposed by section 201, a tax equivalent to eight per centum of the net income of such trade or business, in excess of the following deductions: In the case of a domestic corporation, $3000, and in the case of a domestic partnership, or a citizen or resident of the United States, $6000. Professional earnings and salaries are brought within the application of this tax by a paragraph declaring that in the terms 'trade' and 'business' professions and occupations are meant to be included."

In the operation of that act, a professional man whose ability and industry earn $10,000 a year must pay his income tax like everybody else. In addition he must pay 8% on $4000. On the other hand a man who has inherited money from which he draws an income of $10,000 a year pays his income tax and nothing more. The legal profession bears its full share of the burdens of war and does not participate directly in the revenues of any war industry. The profession asks no special favor, but very rightfully objects to being subjected to a tax on the fruits of its labor which is not imposed on those who receive an equal income without labor.

#### Psychological Elements in Law Making.

IT is most fashionable to decry the admission of emotion to any part in the making or administration of the law; to exalt the "cold, clear light of reason" as the sole permissible guide of the lawmaker and the judge. A former president of the American Bar Association in the course of a recent criticism of legislative tendencies said: "The trouble with much of our legislation is that the legislator has mistaken emotion for wisdom." The idea is one which holds an honored place in the well-known "Kultur" and has received at least one extensive exposition ("The Perils of Emotionalism," by Fritz Berolzheimer, published in the Modern Legal Philosophy Series). It needs, however, but small knowledge of psychology to discern that it is one alien to American ideals. No reform ever found its birth in the realm of intellect. The love of freedom, the love of justice, sympathy for suffering, what are these but emotions which for generations have pressed mankind onward to discover means by which they might be effectuated? Intellectual subtlety created the fellow servant doctrine and assumption of risk, and a national instinct of justice at last revolted from them. Emotion rose in arms at the horrors of slavery and beat down the cold intellectual portrayal of its economic advantages. Personal virtues are merely emotions made permanent. A selfish man feeling a momentary burst of generosity calls it an emotion. When that feeling becomes habitual he becomes a generous man. The teaching that pity is weakness bore fruit in the rape of Belgium. The lesson is not without its value for us. The moment that we as a nation begin to act on the belief that we should be guided by purely intellectual considerations, putting aside as weak and visionary emotion and sentiment, we shall set our feet on the path that leads to some deed of enduring infamy.

#### Selection of Judges by the Bar.

THE question of the extent to which the nomination of candidates for judicial office should be controlled by the bar continues to be much agitated. In contrast to the views of Mr. Shelton heretofore commented on (LAW NOTES, July, 1917, p. 63), attention may be called to a recent open letter of Mr. Justice Hamer of the Nebraska Supreme Court, who said in part:

"Everyone knows that while the judges of the Supreme Court are honest and intend to do right, and that as a whole the result reached is generally the proper result, yet every lawyer of wide experience knows that on nearly every supreme bench there is, or may be, or has been, some judge with peculiar predilections, or unexplainable prejudices. Maybe he is nearly always in favor of breaking the will that is contested, maybe he is nearly always for the city or town that is sued, maybe he is nearly always against the railroad company in a personal injury case, and also against the packing house and against the contractor and builder and the manufacturing plant in all such cases, maybe he is nearly always in favor of the defendant in a criminal case, maybe he is nearly always for the insurance company when it is sued, or for the church or the lodge that is sued, and maybe he is for the big bank as against the little one, and maybe he is for any bank as against its customer.

"These are only illustrations. Whatever the peculiarity of this particular judge may be, the men who obtain his nomination and election have probably secured a bonanza in their business, if his peculiar leaning is in their direction. Therefore, when the lawyers recommend anyone, it is a pertinent question as to what particular line of the law business they are in. They are likely to know the predilections of many judges or their prejudices or tendencies, and they may succeed in making money out of the peculiar habit of thought of the judges instead of out of the merits of the cases tried. Even one judge on the court having strong prejudices in any

direction is dangerous to the safe and orderly administration of justice. Most lawyers of money-making tendencies are likely to lean strongly in favor of the judge whose peculiar views enables them to make money."

To this it may be answered that for every lawyer who favors a candidate because of his known predilections there will be another who opposes him for the same reason. The adherence of a representative majority of the bar can never be obtained on any such narrow grounds. Over and above the entire argument pro and con stands out the salient fact that if the selection of the heads of any other purely technical service, college professors for instance, was made in a manner comparable to the popular choice of judicial candidates ruinous consequences would speedily be apparent.

### Jury Trial.

THE trial of an issue of fact by twelve men wholly unaccustomed to weigh evidence or to follow a sustained argument is obviously an imperfect method of arriving at the truth. Add to that the fact that the same body is required to apply to the facts so much law as they can remember from a brief lecture by the trial judge, and the system seems crude to the last degree. A prominent Chicago practitioner is reported as having said recently:

"One of the greatest obstacles to the dispatch of business in our courts and certainly one of the greatest inducements to the filing of 'speculative' litigation is the fact that a lawyer who has a weak case prefers to try it with a jury. On the other hand, a lawyer who has a good case and who stands upon merit of facts and law, prefers a judge to try it without the aid of a jury. When a jury has rendered a verdict the merits of the case are still open for the judgment of the trial judge, who has the final say on a motion for a new trial and whether a verdict shall stand or not. As a matter of fact and law, the judges control the finality of merits of cases. So why not dispense with juries in civil cases and have three trial judges sit to hear the evidence, decide the facts and apply the law?"

But with all its faults there is much that may be said for the jury system. Repeatedly appellate judges declare with regret that the rules of law compel a decision which is inequitable in the instant case, but they dare not depart from those rules lest they establish a precedent which will overthrow a normally wholesome doctrine. Juries are troubled by no such difficulties; they decide according to the right as they see it, give no reasons and establish no precedents. Moreover, there is a distinct advantage in the interaction of diverse points of view which was well stated in *Graham* v. *Graham,* 157 App. Div. (N. Y.) 52. Reviewing a finding by a trial judge the court said: "The weight of evidence, which ordinarily is determined under our system by a jury in which temperamental considerations are largely balanced, depends so much upon the mental attitude of the individual called upon to try the issues of fact, that it is often important, in giving consideration to the fact that the court has the witnesses before it and is, therefore, better qualified in a measure to determine the weight to be given to the testimony, to get the viewpoint from which the evidence is regarded. Men who in determining a question of fact relating to the title of real estate would accurately determine the weight of evidence, in a question affecting the marriage relation might be entirely governed by their standards of morals, by their preconceived ideas of what a woman should or should not do under a given state of facts, and it becomes the duty of the appellate courts, in reviewing determinations of this character, to look carefully beyond the findings of fact and to the evidence on which the conclusion rests, and in doing so to give to the parties that protection, in a measure at least, which comes from the balancing of personalities in the jury box."

### Corporation Lawyers.

THE lay press in commenting on judicial and other appointments continues to use the term "corporation lawyer" as one of opprobrium. Public sentiment has measurably outgrown the idea that there is no good corporation except a dead one, but the ancient odium still clings to their legal representatives. In the main corporation business is not only the largest but the most intelligently managed. As a necessary corollary the most competent legal assistance is sought and liberally paid for. The number of lawyers who would refuse a retainer from a corporation engaged in any legitimate business is negligible. Accordingly, if the public in selecting its legal advisers should sedulously avoid those who have never been retained by corporations it will, as a rule, get inferior talent. The fact that the persons most competent to judge of an attorney's ability and best able to pay for his services have employed a particular counsel should recommend him to the public. Of course the popular objection to corporation lawyers is not with respect to their ability but is based on the idea that they will in public station be biased in favor of the interest of their former clients. This ignores the fundamental fact that fidelity to the interests of every client is the very essence of the character of a reputable lawyer. Clients come and go but professional loyalty to each in turn is unfailing. Just by reason of that professional characteristic when an attorney becomes the representative of the public he regards the public as his client and extends to it the same fidelity which he previously gave to private interests. The corporations themselves are not so shortsighted. In retaining an attorney who has previously shown distinguished ability in actions against corporations they have never observed any subsequent lack of fidelity to the corporate interest.

### Spooks and the Right of Privacy.

IT is reported in the press that the Psychical Research Society is preparing to bring out a truly posthumous work by the late "Mark Twain" alleged to have been dictated by him to sundry "mediums" and that Mark's daughter threatens proceedings to enjoin its publication. It is somewhat difficult to see on just what ground the right to injunctive relief can be based. Heirs have a right to prevent the publication of private manuscript of the deceased in the absence of a property right of a third person therein. See *Thompson* v. *Stanhope,* Ambl. (Eng.) 737, involving the celebrated letters of Lord Chesterfield to his son. So a living author may prevent a misuse of his pseudonym (see LAW NOTES, Sept., 1917, p. 101), or may enjoin the publication of an inaccurate edition of his book whereby his literary repute may be impaired. See *Archbold* v. *Sweet,* 5 C. & P. 219, involving a proposed third

edition of Archbold's Criminal Pleading and Evidence. In an action by Mark himself (*Clemens* v. *Belford,* 14 Fed. 728) it was once said obiter that for attributing to his authorship something which he never wrote he would be entitled to an injunction. It is not believed, however, that there is any form of retroactive inheritance by which his right to question the accuracy of Mr. Hyslop's mediums can be transmitted to his relatives. There is no civil right of action for defamation of the dead (*Bradt* v. *New Nonpareil Co.,* 108 Ia. 449; *Sorensen* v. *Balaban,* 11 App. Div. (N. Y.) 164), so that any supposed effect of the publication to subject the memory of the late humorist to ridicule will not suffice to sustain the action. It is extremely doubtful if any court would hold that any such publication will impair the value of the existing copyrights on Mark Twain's works so as to give the present owners thereof a right to an injunction. Moreover, it is a dangerous and untrodden field which the court is being invited to enter. No less a scientific authority than Sir Oliver Lodge has publicly proclaimed his conviction of the genuineness of communications received in a similar manner. Granting the possibility that the supposed work is not spurious, it would be a most ungracious act for a generation which is deeply indebted to America's ever delightful humorist to refuse to hear him further.

## OBITER DICTA IN OPINIONS OF UNITED STATES SUPREME COURT.

ATTEMPTED judicial construction of the unequivocal language of a statute serves only to create doubt and to confuse the judgment. Article *Statutes and Statutory Construction,* 1 Fed. Stat. Annot. (second edition), p. 26, citing several federal cases and quoting Mr. Justice Swayne as having said: "Affirmative discussion under such circumstances is not unlike argument in support of a self-evident truth. The logic may mislead or confuse. It cannot strengthen the pre-existing conviction." And in *St. Louis, etc., R. Co.* v. *Taylor,* 210 U. S. 281, 295, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061, 1068, Mr. Justice Moody quoted the "simple words" in an act of Congress and said, "Explanation cannot clarify them, and ought not to be employed." The latter admonition was not followed in a late case decided by the United States Supreme Court, and that fact makes the occasion for the following article.

In *U. S. ex rel.* v. *Lane,* U. S. Adv. Ops. 1917, p. 140, 38 S. Ct. 94, decided December 10, 1917, and not officially reported at this time of writing, a question was certified to the federal Supreme Court by the Court of Appeals of the District of Columbia. The certificate was dismissed for want of jurisdiction, inasmuch as the case was not one in which the decision of that Court of Appeals would be final, and Judicial Code, sec. 251, authorizes such certificate only "in any case in which its judgment or decree is made final." Chief Justice White, writing the opinion, said: "The unambiguous command of the text [of sec. 251] excludes the necessity for interpretation." In a similar situation in *Central Trust Co.* v. *Lueders,* 239 U. S. 11, 36 S. Ct. 1, 60 U. S. (L. ed.) 119, set forth in 1 Fed. Stat. Annot. (second edition) pp. 833, 834, the court disdained to give any further consideration to the point offered and contented itself with a mere memorandum opinion. In the Lane case, however, Chief Justice White proceeded:

"But if it be conceded for the sake of argument that there is necessity for interpretation, the briefest consideration will reveal the coincidence between the animating spirit of the provision and the obvious result of its plain text. It is undoubted that the authority to certify conferred upon the court of appeals of the District by § 251 did not previously exist in that court in any case. The circuit courts of appeals, however, had undoubtedly, under the act of 1891, a power to certify. 26 Stat. at L. 828, chap. 517, § 6. But while by the terms of that act such authority apparently extended to 'every such subject within its appellate jurisdiction,' it came to be settled that, by limitations found in the text, such power to certify was restricted to cases in which the judgments or decrees of the circuit courts of appeals were final, and therefore not susceptible of being of right otherwise reviewed in this court. *Columbus Watch Co.* v. *Robbins,* 148 U. S. 266, 268, 37 L. ed. 445, 446, 13 S. Ct. 594; *Bardes* v. *First Nat. Bank,* 175 U. S. 526, 527, 44 L. ed. 261, 20 S. Ct. 196. Coming to provide concerning this situation the Judicial Code enlarged the power of a circuit court of appeals by conferring authority to certify 'any case within its appellate jurisdiction' (§ 239); but, in giving power to certify for the first time to the court of appeals of the District, expressly limited it to cases 'in which its judgment or decree is made final' (§ 251). The expansion of authority conferred upon the circuit courts of appeals at the same time that the restricted authority was conferred upon the court of appeals of the District makes manifest the legislative intent to give a greater power in the one case than in the other."

In *Columbus Watch Co.* v. *Robbins,* the first case cited in the foregoing quotation, the sole question decided was that the certificate there presented was not in proper form. Upon close inspection of Chief Justice Fuller's opinion in that case it can be seen,—but hardly without "a pair o' patent double million magnifyin' gas microscopes of hextra power," and Chief Justice White prudently assists the reader by designating the exact page,—that he read section 6 of the Circuit Court of Appeals Act as confining the power of certification to "such cases" as were made final. In *Bardes* v. *First Nat. Bank,* the other case cited in the foregoing quotation, it was simply held that the *District Court* was not authorized to certify the question of its jurisdiction until after final judgment. No other matter was involved, and in the course of a short opinion, Chief Justice Fuller casually stated that section 6 of the Circuit Court of Appeals Act provided that "in cases made final in the circuit court of appeals, those courts might at any time certify to this court any questions," etc. In neither of the foregoing cases did the court make any further allusion to finality as conditioning the right to certify; the point was not noticed by the headnoters in the reports of those cases in the official volumes, the Supreme Court Reporter, or the Lawyers' Edition; and neither case was cited to the point in any federal digest subsequently published and including those cases. It was not noticed in Foster's Federal Practice, 5th edition; and in Loveland's "Appellate Jurisdiction of Federal Courts," where minute and intensive treatment of the subject of certifying questions is given, the author did not discover in those cases the point now discerned by Chief Justice White as having been "settled" in them. Text

writers and digestsmiths may well stand amazed to learn that every fluid remark of a federal judge must be regarded as a precedent. Even now there are treatises on federal subjects with title page announcement of contents so comprehensive that a Pure Law Book Law would exclude them from interstate transportation as bearing a false label.

If a judge's inexact recital of statutory provisions must be studied as a possibly authoritative gloss, it might be necessary to know and consider the personal equation of the judge in respect to his observations of that character. Thus, Chief Justice Fuller's carelessness in stating the terms of a statute, in *Fisk* v. *Henarie,* 142 U. S. 459, 12 S. Ct. 207, 35 U. S. (L. ed.) 1080, was clearly pointed out by Judge Taft in *Detroit* v. *Detroit City R. Co.,* 54 Fed. 10, where he also said: "The case before the supreme court did not require the construction contended for." In Ex p. Wisner, 203 U. S. 449, 460, 27 S. Ct. 150, 51 U. S. (L. ed.) 264, 268, Chief Justice Fuller said that the federal circuit court could not obtain jurisdiction by removal in certain cases "even with the consent of both parties." In *Matter of Moore,* 209 U. S. 490, 507, 28 S. Ct. 585, 52 U. S. (L. ed.) 904, 912, 14 Ann. Cas. 1164, the court said: "Special reliance is placed by petitioner upon this statement in the Wisner case. . . . There was no pretense of any consent on the part of the plaintiff in that case, and therefore this statement was unnecessary." The statement was therefore "overruled, though the Wisner Case was otherwise left untouched," as declared in *In re Winn,* 213 U. S. 458, 469, 29 S. Ct. 515, 53 U. S. (L. ed.) 873, 878. But it had given much trouble to federal courts and practitioners.

In *Carroll* v. *Carroll,* 16 How. 275, 14 U. S. (L. ed.) 936, Mr. Justice Curtis said: "This court . . . has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties," and cited cases in "illustration of the rule." But no test has ever been formulated by the Supreme Court whereby to determine with certainty whether views expressed in an opinion are or are not purely obiter. The court has taught rather by example than by definition. Thus in *Bryan* v. *Bernheimer,* 181 U. S. 183, 197, 21 S. Ct. 557, 560, 45 U. S. (L. ed.) 810, 819, Mr. Justice Gray unhesitatingly declared that *his own* "remark" in *Bardes* v. *First Nat. Bank,* 178 U. S. 524, 538, 20 S. Ct. 1000, 1006, 44 U. S. (L. ed.) 1175, 1182, "was an inadvertence, and upon a question not arising in the case then before the court," and not to be regarded. On the other hand, a certain statement in the opinion in *Stone* v. *South Carolina,* 117 U. S. 430, 6 S. Ct. 799, 29 U. S. (L. ed.) 962, was rejected in *Amy* v. *Manning,* 144 Mass. 153, 10 N. E. 737, because the actual decision "did not go so far as those words" in the opinion; but this ruling of the Supreme Judicial Court of Massachusetts was held to be erroneous in *Burlington, etc., R. Co.* v. *Dunn,* 122 U. S. 513, 7 S. Ct. 1262, 30 U. S. (L. ed.) 1159, where the statement was upheld as one made "on full consideration and with the view of announcing the opinion of the court on that subject." In *Hiscock* v. *Mertens,* 205 U. S. 202, 209, 27 S. Ct. 488, 491, 51 U. S. (L. ed.) 771, 774, Mr. Justice McKenna said the court was "confronted with the problem whether the obiter in *Holden* v. *Stratton*"—a prior Supreme Court decision—"shall be pronounced to be the proper construction of § 70 of the bankrupt act," and it was held "that that obiter was not inconsiderately uttered," but was an explicit declaration of the views of the court.

But let Chief Justice Fuller's obiter in *Columbus Watch Co.* v. *Robbins,* above cited, (reaffirmed by Chief Justice White) be considered on its merits. Speaking of the provision in section 6 of the Circuit Court of Appeals Act, he said the power to certify was there limited to "such cases" as were made final. Those were not the words used in that act. In 5 Fed. Stat. Annot. (second edition), p. 796, sections 5 and 6 of the Circuit Court of Appeals Act are reprinted, the annotator making this prefatory explanation: "These sections are here set forth as having a possible bearing on the construction of the sections of the Judicial Code among which the provisions in said sections 5 and 6 were distributed, and *especially to exhibit the collocation of the several provisions* in section 6." Here is the provision for certification in section 6:

". . . and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every *such subject* within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions," etc.

Any one familiar with federal laws and decisions knows that the word "subject" in this connection may almost be styled a term of art; it is used to describe a jurisdiction other than one depending on the character of the parties. This circumstance, together with the peculiar punctuation, would indicate that the antecedents of the word "such" are confined to those specified *subjects following the semicolon.* But this would lead to the ridiculous conclusion that Congress had excluded the power to certify questions in cases where jurisdiction was based solely on diverse citizenship or alienage, thereby making a "senseless discrimination," which the federal Supreme Court has repeatedly declined to impute to Congress in similar cases. Article *Statutes and Statutory Construction,* 1 Fed. Stat. Annot. (second edition), p. 103. Furthermore, Chief Justice Fuller did not notice that by using the words "such cases" in the Circuit Court of Appeals Act in place of the words "such subject," the restrictive sense of the word "such" disappeared, and it applied collectively to the entire description of appellate jurisdiction in the preceding part of the section. Besides, the rule that relative words should ordinarily be referred to the word or clause with which they are grammatically connected has often been disregarded, and the word "such" is not necessarily to be referred to the very next antecedent. Article *Statutes and Statutory Construction,* 1 Fed. Stat. Annot. (second edition), p. 74, and cases cited. Again, if Congress intended that the power to certify should exist only in cases within the final jurisdiction of the Circuit Court of Appeals why was not that intention manifested by inserting the word "final" before the word "appellate"? In very many cases a proposed construction which would unwarrantably contract or expand the meaning of Congress

has been rejected by the federal Supreme Court upon the declared presumption that the legislature would have expressed what "it would have been easy to say" had there been such an intention. Article *Statutes and Statutory Construction,* 1 Fed. Stat. Annot. (second edition), p. 41, where several interesting and strikingly persuasive illustrations are given.

In the notes to Judicial Code, sec. 239, 5 Fed. Stat. Annot. (second edition), p. 839 et seq., are cited all the reported cases of certified questions since the enactment of the Circuit Court of Appeals Act of 1891. It is believed that in some, perhaps in many, of those cases where the questions were answered without objection, the decision of the Circuit Court of Appeals would not have been final. See, for instance, *Hills & Co.* v. *Hoover,* 220 U. S. 329, 31 S. Ct. 402, 55 U. S. (L. ed.) 485, where, apparently, a federal question involved was the ground of federal jurisdiction.

The Joint Special Committee who prepared the Criminal Code and the Judicial Code were instructed by Congress "to indicate any proposed change in the substance of existing law," and to append "notes which shall briefly and clearly state the reasons for any proposed change." In their reports of both of these Codes the Committee faithfully followed those instructions, and were especially careful to mention in the notes all the changes they made and the reasons therefor. Thus, in Judicial Code, sec. 256, eighth clause, they revived the paragraph in Rev. Stat. sec. 711, which had been repealed in 1875, and no one can read their explanation for so doing as set forth in 4 Fed. Stat. Annot. (second edition), p. 924, and conceive it possible that they deliberately made an "expansion of authority," which Chief Justice White says they did in Judicial Code, sec. 239, and then declared in their note to the latter, as their official report shows: *"The section states what was existing law upon the subject."* To quote from an opinion of Lord Stowell, one "must have the faith of ten men to believe" that they purposely enlarged the power of the Circuit Court of Appeals. Chief Justice White thinks their substitution of the words "any *case*" in sec. 239 for the words "every such *subject*" in the Circuit Court of Appeals Act operated to inflict this new duty upon the Supreme Court, already notoriously overburdened. But Chief Justice Fuller when he made the same substitution in his remark in the Columbus Watch Co. case, above cited, was not conscious that it changed the meaning of the Circuit Court of Appeals Act. And in Judicial Code, sec. 294, the lawmakers said: "There shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest." The change was not thus "manifest" to Chief Justice Fuller. It may be observed that the word "case" instead of "subject" is used in the paragraph in the Circuit Court of Appeals Act section conferring the power to issue certiorari.

A circumstance of which Chief Justice White was apparently unaware, but which it would be disingenuous for the writer of this article to withhold from the reader is this: In the final report of the Commission to revise the statutes (predecessors of the Joint Special Committee), a huge volume submitted to Congress in 1906, sec. 1291, providing for certifying questions to the Supreme Court begins as follows: "In any case within its appellate jurisdiction, *and in which its judgment or decree is made final.*" The disappearance of the italicised words when Judicial Code, sec. 239, was submitted and enacted might have some weight, were it not for the positive asseveration of the Committee that "the section states what was existing law." The omission does seem, however, to make it uncertain whether the Committee believed that the "existing law" had been settled by Chief Justice Fuller's dicta and deemed that his construction would attach to their slightly changed provision—changed in the ordinary process of revision—or whether they were ignorant of Chief Justice Fuller's view and thought the "existing law" authorized a certification in all cases, whether final or not final. By the way, in *Loeser* v. *Savings & Deposit Bank & Trust Co.,* 149 Fed. 975, 980, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233, 1237, Judge (afterward Mr. Justice) Lurton said: "It is only in extremely doubtful matters of interpretation that the legislative history of an act of Congress becomes important," and the dropping of the words "or permitted" in a certain statute, by the Senate, was "of no vital signification."

If the Supreme Court shall find that certification of questions in cases not made final is apt to become a nuisance, and shall be persuaded that Chief Justice Fuller "settled" the meaning of the Circuit Court of Appeals Act, or shall be independently convinced that his view was correct, the contention made in this article is that there should be little difficulty in interpreting sec. 239 as still bearing that construction, and in pronouncing Chief Justice White's statement to the contrary "unnecessary" and not binding, precisely as it did with Chief Justice Fuller's statement in the Wisner Case.

CHARLES C. MOORE.

## DISLOYALTY AND TREASON AND THEIR PUNISHMENT AS PROVIDED BY FEDERAL LAWS *

THE sporadic activities of a few agitators who, led by good or bad motives, seek to hamper our work in the war, justify me as the chief law officer of the executive branch of the Government in calling attention to the duties, moral and legal, of all persons owing temporary or permanent allegiance to the United States.

The German Government began this war by a contemporaneous breach of its formally plighted faith made in solemn treaty and from the beginning until now has more than made good this ominous earnest of its intention and temper. The President has shown us how one by one, as opportunity offered, the safeguards which civilization has been able during the centuries to throw around neutrals and the nonfighting people of warring nations were ruthlessly torn down; how patient and long-suffering remonstrance and request were met by fair words, and fairer promises made only to be broken.

### *No Rule of War Held Sacred by the German Imperial Government.*

We all know as but sober fact, plainly stated, that the Imperial Government has allowed no rule of war, no principle of civilization, no consideration of humanity, no teaching of Christianity to

* By Thomas W. Gregory, Attorney-General of the United States, in the Official Bulletin.

stand between it and the working out of its illegal purposes. For half a century that Government has schemed and prepared to dominate the world by "blood and iron." For half a century the officials of the Imperial Government, from the Kaiser down, including even the teachers of their children, have prostituted the minds of their youth until the whole people has been led to a toleration, if not approval, of the hideous outrages and barbarities practiced by that Government in this war. While yet we were neutral, struggling to keep free from the conflict, the representatives of that Government in this country planned to destroy our factories and our railroads, forged our public papers, deceived us when convenient, violated our hospitality and our sovereignty, while they plotted against our territorial integrity; they deliberately and with malice and affronting forewarning drowned our helpless women and babies and declared a public holiday that their own innocent children might celebrate the murder.

*Cruelty Under a System That is "Diabolical in its Efficiency."*

They have bombarded unfortified towns and bombed the unprotected homes of their foes, taking their toll of wounded and dead from the aged and infirm, the young and the helpless. They have made barren desert of the garden spots of the earth; they have needlessly pillaged and wilfully burned towns; they have reduced to slavery men, women and children; they have wrecked and torn asunder families with a system diabolical in its efficiency; they have wantonly defiled and destroyed the temples of God. They have done all of these things that they might strike terror into the hearts of men so as more easily to conquer and rule them.

As the war has gone on, the ultimate aim of the Imperial Government has become more and more clear. Drunk with the sense of its own power and its asserted superiority, it has proposed to secure a dominating position for itself and for its system over the entire world. Nowhere yielding to the people their rightful powers, and everywhere seeking to uphold autocracy and despotism, it has shown its intention to perpetuate absolute government of which it admittedly is the head and front. Its "kultur" is avowed to be the acme of human goodness and endeavor, and is to boast the rulership of the world, gained by force and arms.

The world must fight to preserve itself. Of this there can be no doubt.

*"Present War Becomes a Conflict Between Peoples Themselves."*

Heretofore, save in rare cases, war has been a fight between armies; but this war, because of the initial preparation for it by an autocracy which prostituted a whole mighty nation to its purpose is a contest between peoples themselves. It is correspondingly intense and relentless. The march of events shows that it is now a war of systems—kings against peoples. If our enemy win, kings will dominate the world, because no democracy fights with or for them. The Prussian autocrat and the brutal Turk will impose upon us their wills, tell us what we may do, what we may not do, and the horrors and atrocities of Belgium and Armenia leave no doubt what this means. "Government of the people, by the people and for the people will perish from the earth." In this sense this is truly a war of absolute and complete extermination not of peoples, but of systems, and so far as human sight can pierce the future the life of the one system or the other waits on the result.

Thus our own very life came to be bound up in the outcome of this war long before we entered it, and even years before the war broke. To the man of vision it is as clear as sunlight that the aim and the plan of the Imperial Government was and is to conquer the world, nation by nation. It was first to defeat France and Russia, next to dominate Great Britain, and with Europe at its feet to turn to America. "Kultur and the German sword were to rule around the world. We have been thus forced by the Imperial Government itself to choose whether, in addition to suffering outrage and plunder, we should calmly wait to be crushed ourselves in due time and at the pleasure of the royal will, or should make common cause with those who already fought for us as well as for themselves, to the end that autocratic domination over all mankind should not come to pass.

With all this before them, Congress, the chosen representatives of the people, exercising their constitutional duty and with a realizing sense of their great responsibilty, announced in joint resolution "that the state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby formally declared," and that "to bring the conflict to a successful termination all the resources of the country are hereby pledged."

*Those Unwilling to Sacrifice Unworthy to Enjoy Liberty.*

This is our promise to those we help, our warning and threat to those we fight. Our own fair name is bound up in this pledge. Our honor demands that it be met to the full measure. From the time Congress and the President thus spoke for us it became the duty, moral and legal, of each of us to abate nothing that lay within his power to make our pledge good. Whatever our views, whatever our sympathies theretofore had been, the quarrel was now our quarrel, and we must be true to it in order to be true to ourselves. That this meant that some of us must break with cherished memories, with friends, home and kindred, can not matter. So broke our fathers, who gave us our liberties; so must we break to preserve them. The man who is unwilling to make that sacrifice is unworthy the liberties he enjoys and is unwelcome in our midst. The sovereign people of the United States have willed that our every available resource of men and industry must play its part in winning this war, and no head is too high or too low to wish to escape the heavy hand of our sovereign necessity.

I have spoken thus far, not of the legal penalties which attach to obstruction and disloyalty to this Government, but of the broad political and moral elements of our situation and of the considerations of integrity and honor which must impel us to loyalty to our cause and compel our active aid and support. I have done this because after all our safety lies not in penal statutes, but in a realizing sense of a righteous cause, a firm resolution to do our full duty, and an understanding that we fight for the liberties of ourselves, our families, and our posterity.

*To be no Halfway Measures in Combating Disloyalty in U. S.*

I have purposely moved slowly and with caution in invoking the strong arm of the law for seeming disloyalty, believing that more mature consideration would show the occasional agitator that he was wrong and the rest of us were right. However, I shall not be half measured in undertaking the control of those who persist in their disloyalty and schemings against the Government and its purposes.

The Federal Government is not powerless to handle such malcontents. Amongst other offenses, it can prosecute those who wilfully make or convey false reports or false statements when the United States is at war, with intent to interfere with the operation or success of the military or naval forces of the Federal Government, or to promote the success of our country's enemies; also those who wilfully cause, or attempt to cause, insubordination, disloyalty, mutiny or refusal of duty, or wilfully ob-

struct the recruiting or enlistment service of the United States; also those who unlawfully combine or conspire to impede, obstruct, or prevent the execution of the laws of the United States; also those who undertake to overawe the officers of the United States in performing their duties either by direct intimidation or threats, or by injuring their persons or property; also those who engage in seditious conspiracies to overthrow or levy war against the Government or forcibly oppose its authority.

*Federal Laws Sufficient to Punish all Disloyal Agitators.*

The recently enacted espionage act is designed, among other things, to punish spies, regulate the use of the mails, and punish those who abuse that use.

The provisions of the selective draft act provide punishment for those who fail or refuse to register, or hinder or obstruct the enforcement of that act.

Treason (defined by the Constitution as consisting only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort) is punishable by death, and the other offenses mentioned by severe and just penalties.

The Federal Government can find in existing statutes and others now pending before Congress power to handle any situation likely to arise because of the ill-advised activities of disloyal agitators.

## PAYMENT OF MONEY AS PART PERFORMANCE.

IN the recent case of *Chaproniere* v. *Lambert* (117 L. T. Rep. 353; (1917) 2 Ch. 356) the Court of Appeal held that the payment of rent in advance under a parol agreement for a lease does not take the case out of the Statute of Frauds inasmuch as such payment is not to be regarded as part performance within the equitable doctrine. In thus deciding, the court followed the decision of Mr. Justice Bigham in *Thursby* v. *Eccles* (1900, 49 W. R. 281). In this article it is proposed to examine the grounds for the view that the courts take that payment of money is not a part performance.

The doctrine of part performance is, of course, essentially an equitable one. Its recognition was opposed by the Common Law judges and from time to time severely criticized by them. Even some Lord Chancellors and Vice-Chancellors have felt it necessary to apologize for the doctrine. It seemed a violent thing, when the Legislature had laid it down that no action shall be brought on any contract or sale of lands unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or his agent, for the courts to enforce such a contract in the absence of such a written document. But the justice of the doctrine has never been questioned. It was said that the courts of equity had in effect repealed the statutory provision. To this the courts of equity replied that to fail to give relief in the cases in which those courts gave relief would be to allow a statute passed for the purpose of preventing fraud to be used as an instrument of fraud.

The necessity for the introduction of the doctrine may be shown as such a case as this: Suppose an owner of land to agree verbally with a would-be purchaser to sell the land to the latter. Suppose, further, that the vendor should stand by and allow the purchaser to proceed on the footing that there was a subsisting enforceable contract, and in that belief to enter and commence to build on the land. Suppose the vendor on one pretext or another to delay the execution of the conveyance of the land and to allow the purchaser to complete the house. Then suppose the vendor to enter and take possession of the land and the house and to set up the provisions of the Statute of Frauds in defense of any action the purchaser might bring. The purchaser would have to ground his action on the contract, but, the contract not being in writing nor signed by the vendor, the bringing of the action would be just what the statute had expressly prohibited. Thus by fraud the vendor would have had a house built on his land at the purchaser's expense. This supposed case is, of course, an extreme one, but it serves as an example of the mischief that would follow had the courts of equity never invented the doctrine of part performance.

The logical ground upon which the courts got over the accusation made against them that they were effecting a repeal of the statute was that in allowing a person to bring an action on the contract they were recognizing equities in his favor. They were not charging the defendant, who set up the statute, with the contract. No, the defendant was charged on the equities. "In a suit founded on part performance," said Lord Selborne in the case of *Maddison* v. *Alderson* (49 L. T. Rep. 303; 8 App. Cas. 467) the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow."

It has been laid down that in order that acts may amount to part performance so as to allow the doctrine to apply, they must be unequivocally referable to the contract. But to ascertain whether they are or are not so referable, the court must find out the nature of the contract. Wherefore parol evidence of the parol agreement is admissible. The Statute of Frauds does not avoid parol contracts. It bars the legal remedies by which they might otherwise have been enforced. But it will be observed that where there has been part performance, within the meaning of the equitable doctrine, and the party who seeks to have the contract carried out, and who has partly performed the same, comes to the courts for that purpose, his suit or action is regarded by the courts as based on equities in his favor, which equities in turn arise out of and are originally based on the contract. It is essential that his acts should be shown to be unequivocally referable to the contract. The reason is obvious. If what he has done can be explained in other ways, it is clear that no equity should arise in his favor.

Nobody has yet discovered why part payment of purchase money is not an act which is unequivocally referable to the contract—why, in other words, the payment of part or indeed of the whole of the purchase money should not be regarded as part performance. Various explanations have been put forward, none of them very satisfactory. It has been suggested that the money may be repaid. This apparently was the ground suggested in the case of *Clinan* v. *Cooke* (1 Sch. & Lef. 22), and in much more recent time by Mr. Justice Bigham in the case of *Thursby* v. *Eccles* (1900, 49 W. R. 281), and again by Lord Justice Warrington in the recent case of *Chaproniere* v. *Lambert*, to which we referred in the opening lines of this article. Again it has been suggested that, inasmuch as the statute expressly allowed earnest money or part payment of purchase money to be available in the case of personal estate, that of itself negatives its being allowed to have that effect in the case of real estate. This latter suggestion appears in the report of the case of *Watt* v. *Evans* (1834, 4 Y. & C. Ex. 579) as having fallen from Lord Lyndhurst. In that case his Lordship held that part payment of purchase money was not enough to take the case out of the statute, but whether he grounded his decision on the suggestion

we have just mentioned is not clear. Lord Selborne gave another reason why payment of purchase money was not recognized as part performance. His Lordship in *Maddison* v. *Alderson* (*sup.*) put it down to the fact that the payment of money is an equivocal act, not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land.

It is quite obvious that none of these reasons explain the rule that payment is not part performance. Let us take each of these explanations *seriatim*, and, if we may, in reverse order. First, then, Lord Selborne's reason. Possession is part performance in certain circumstances. That is to say, the taking of possession by the would-be purchaser. When he is found in possession, one of three reasons may explain things. First, he may be there under a contract. Secondly, he may be there under a voluntary gift. Thirdly, he may be there as a trespasser. In the latter two cases no contract is involved. Why, then, should his being found in possession postulate the existence of some contract?

Now let us turn to Lord Lyndhurst's suggestion—namely, that the statute in the case of personal property allows part payment as a means of clinching the bargain, whereas there is no such provision in the case of contracts concerning land. But have the courts of equity ever treated the provisions of the statute very seriously when those courts have allowed a person to take the benefit of a contract where the formalities prescribed by the statute have not been observed? Moreover, it is to be observed that the courts regard the plaintiff's action as founded on equities. The defendant is "charged," as Lord Selborne pointed out in *Maddison* v. *Alderson* (sup.), not on the contract, but on the equities which have arisen in the circumstances. Moreover, Lord Lyndhurst's reason presupposes a very strict construction of the provisions of the statute. On the whole, this seems the weakest of all the three reasons we have mentioned.

Lastly, as to the reason that money paid can be recovered back, this overlooks two points. It does not follow that the party who has recovered the money will be in the position to return it even if he would. Suppose he becomes bankrupt in the interval, what happens to the money? Again, suppose he does not wish to return it, what is the position? How does the other party frame his action? How is that other party to get over the fact that as the law stands money voluntarily paid in mistake of law cannot be recovered? Was his money paid in mistake of law or in mistake of fact? That depends on the circumstances. Suppose a would-be purchaser to agree verbally to purchase Blackacre from the owner in fee. Suppose he pays the owner something on account in part payment of the purchase money. Suppose both parties honestly believe that such payment clinches the matter, and that from thenceforth the vendor is bound to sell and the purchaser to purchase Blackacre. Suppose the vendor gets a new offer from a third party at a greatly increased price, and his own lawyer advises him that the contract with the original would-be purchaser is not enforceable because of the Statute of Frauds. Up to that point all money paid by the first would-be purchaser to the vendor has clearly been paid under a mistake of law.

That equity would not, nor apparently will not, give relief to a party who has paid money in mistake of law seems clear from the judgment of Lord Justice James in the case of *Rogers* v. *Ingram* (35 L. T. Rep. 667; 3 Ch. Div. 351). His Lordship, after pointing out that no action lay for money had and received in such circumstances, said that there were no more equities affecting the conscience of the person receiving the money in the one court than in the other court. That is to say, the learned Lord Justice held that the courts of equity would not in such cases go a step further than the Common Law courts. "Relief has never been given," said his Lordship, "in the case of a simple money demand by one person against another, there being between those persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties." The origin of this rule at common law does not seem at all satisfactory when the earlier cases are examined. Yet it is now too late to doubt the rule that money paid voluntarily under a mistake of law cannot be recovered.

This disposes of all the supposed reasons given for the rule that payment is not of itself enough to constitute part performance within the meaning of the equitable doctrine of part performance. None of them seems at all satisfactory, and we are forced to the conclusion that the whole rule simply grew by accident side by side with other rules based on sounder principles. But it is too late to doubt now that part payment is not part performance. In the recent case to which we referred in the opening lines of this article the Court of Appeal held that payment of rent in advance on an alleged contract to take a lease was not part performance. A similar decision had already been given in the case of *Thursby* v. *Eccles* (*sup.*), to which we have referred.

It seems clear, however, that if a man verbally agreed to sell land to another with the deliberate intention of pocketing money paid on account of the agreed purchase price and with the intention of setting up the Statute of Frauds and refusing to complete, an action of deceit would lie against him for the fraud. Apart from fraud, it may be that the court would regard money so paid as paid on an implied condition that if the purchase did not go through it would be returned. It might be that the court would hold the payee to be a trustee of the money.—*Law Times.*

## Cases of Interest

LIABILITY OF PARENTS FOR ALIENATION OF AFFECTIONS OF DAUGHTER.—The question suggested by the catchline is thoroughly considered in Kleist *v.* Breitung, 232 Fed. 1014, Ann. Cas. 1917E 1014 and note. It is there said to be the law that parents are justified in giving counsel and advice to a daughter who has contracted a marriage with a man who is believed by her father to be wholly unfitted to make her happy and to support her properly. If he acts without malice and is prompted by affection for his daughter and solicitude for her health and happiness, he cannot be held liable for alienation. In short, the law takes a practical common-sense view of such situations as are here disclosed; it recognizes the relation of parent and child as well as the relation of husband and wife and in no case has a parent, who has acted in good faith, been mulcted in damages for advising, protecting and sheltering a daughter who has contracted an ill-advised marriage with a man who is unable to support her properly.

PRESUMPTION OF RECEIPT OF TELEGRAM.—The rule is settled that when a telegram, properly addressed, is delivered to the company, with payment of the fee for transmission, or is shown to have been sent, delivery to the addressee is to be inferred. But in City of Ottumwa *v.* McCarthy Imp. Co., 175 Ia. 233, 150 N. W. 586, reported and annotated in Ann. Cas. 1917E 1077, it is held that there is no presumption from the fact that a telegraph company found a telegram among its files, where no showing was made as to how or for what purpose the telegram came into possession of the company, nor as to payment of fee. In the annotation to the case it is said: "The rule that the receipt of a telegram is presumed from its delivery for transmission is limited to actions involving disputes between the sender and sendee and their privies, and where the telegraph company is a party to

the action the presumption will not arise. . . . Nor does the rule apply to cablegrams sent during a period of unusual disturbance such as war. . . . The doctrine has been further limited in Missouri, the court holding that before the presumption of receipt by the addressee can arise it must be shown that the telegram was received by the telegraph company at its office in the place to which it was directed."

COMMUNICATION BETWEEN HUSBAND AND WIFE AS PRIVILEGED WHEN HEARD BY BYSTANDER.—It is of course well settled that in an action of slander it may be shown as a defense that the alleged slanderous words were spoken in a conversation between husband and wife. That fact gives rise to a qualified privilege. But suppose a bystander overhears the conversation? This question arose in Conrad *v.* Roberts, 95 Kan. 180, 147 Pac. 795, reported and annotated in Ann. Cas. 1917E 891, and it was held that where the presence of bystanders at a conversation between husband and wife was a mere casual incident, not in any sense sought for by the defendant, the latter would not be deprived of the privilege. In that case the defendant pleaded a qualified privilege that the words were spoken in a conversation with her husband at a time when she understood her husband was liable to be arrested for his conduct with the plaintiff and another woman where he lived, and that it would result in disgrace being brought upon their family, and that she desired to warn him in the protection of his own interests as well as that of the family. It was held that an instruction charging that if a third person overheard what was said the matter was not privileged unless such person was a mere eavesdropper, was error.

DOCTRINE OF RES IPSA LOQUITUR AS APPLICABLE TO SUIT AGAINST GAS COMPANY FOR LEAK OCCURRING IN PIPE CAUSING EXPLOSION OF GAS.—Some doubt has existed as to whether in a suit against a gas company for damages caused by an explosion of gas from a leak in a gas pipe the doctrine of res ipsa loquitur is applicable, but in a recent Rhode Island case, namely, Di Sandro *v.* Providence Gas Co., 102 Atl. 617, the court took the view that the doctrine did not apply. Baker J., said: "Cases holding that mere proof that a leak of gas existed or that an explosion occurred is not of itself sufficient to establish liability on the part of a gas company, in other words, that the rule of res ipsa loquitur does not apply, are cited in a note to Dowler *v.* Citizens' Gas & Oil Co., 33 Ann. Cas. 356, under the title Sufficiency of Evidence. See also 12 R. C. L. 912, §52. The Supreme Court of Minnesota has held that the rule referred to is applicable in such cases. See Gould *v.* Winona Gas Co., 100 Minn. 258, 111 N. W. 254, 10 L. R. A. (N. S.) 889; Manning *v.* St. Paul Gaslight Co., 129 Minn. 55, 151 N. W. 423, L. R. A. 1915E 1022, Ann. Cas. 1916E 276. In both cases, however, the court calls attention to other evidence from which negligence might properly have been inferred apart from or in connection with the fact of the escape of gas.

ADMISSIBILITY IN CIVIL CASE OF EVIDENCE SHOWING THAT WITNESS HAD PREVIOUSLY CLAIMED PRIVILEGE IN CRIMINAL CASE.—In Loewenherz *v.* Merchants and Mechanics Bank of Columbus, 144 Ga. 556, 87 S. E. 778, reported and annotated in Ann. Cas. 1917E 877, it was held that the court erred in admitting certain documentary evidence showing that the witness in a criminal case had declined to answer before the Grand Jury certain questions propounded to him on the ground that to answer those questions might tend to criminate himself. The admission of this evidence tended to destroy or at least abridge the privilege of the witness, guaranteed by the constitution of the state, of refusing to answer questions tending to criminate him, and to deprive him of the protection of that privilege which it was the purpose of the constitution to give. In the annotation it is said: "There are but two decisions besides the reported case passing on the admissibility of evidence in a civil case showing that a witness testifying therein had previously claimed the privilege of refusing to testify in a criminal case. These are in accord with the reported case holding that such evidence is inadmissible on the ground that the witness would be deprived of the privilege given him by the constitution if the fact of making the claim was subsequently admitted to discredit him. Masterson *v.* St. Louis Transit Co., 104 Mo. 507, 103 S. W. 48; Garrett *v.* St. Louis Transit Co., 219 Mo. 65, 16 Ann. Cas. 678, 118 S. W. 68."

COMPUTATION OF TIME IN CONTRACT AS CALLING FOR INCLUSION OF INTERVENING SUNDAYS.—The case of Perry *v.* Brandon, 32 Ont. L. Rep. 94, reported and annotated in Ann. Cas. 1917E 948, decides that where a contract for the hire of a steam shovel plant provides for a rental of a stipulated sum per day "to run each and every day until the work is complete" intervening Sundays are to be included in computing the number of days for which rental is to be paid. But Clute, J., dissenting says: "With great respect, I have the misfortune to dissent from the view taken by the majority of this court. Where a contract is open to two constructions, one of which contravenes a public statute and the other does not, it should, I think, be assumed that the parties did not intend to commit a breach of the law. In the present case I do not think it would be legal to contract in so many words to do work on a Sunday; and, as I read the contract, there was no intention to do so unless certain work became necessary. It is a contract to pay $62 per day for the use of the plant; ten hours to constitute a day; all work outside of these hours to be charged extra as overtime, on week days as time and a half and on Sundays as double time. This, I think, clearly shows that whatever days or parts of days were to be paid for were those days on which work could be done. It is true that the word 'rental' is used, but the other parts of the contract show its meaning. The rental was to start immediately on the outfit leaving the main line 'and run each and every day until work is complete;' a minimum rental charge of not less than twenty days is to be made if the plant is released before the expiration of that time. In addition to the plant, the plaintiff has agreed to supply the labor necessary to run it, namely, the cranesmen, firemen, engineer, watchman, six pitmen, other labor to handle the work to be supplied by the defendants."

HOLDING OF COURT IN THEATER AS GROUND FOR REVERSAL OF CASE TRIED.—The holding of court in a theater was condemned in Roberts *v.* State, 100 Neb. 199, 158 N. W. 930, reported and annotated in Ann. Cas. 1917E 1040. The ruling was that it is not proper to adjourn a criminal trial for a capital offense from the regular courtroom to the stage of a public theater, without sufficient cause for so doing, the theater itself being filled with people, and under some circumstances may be so prejudicial to defendant as to require a reversal. In the opinion of the court it was said: "The court removed the trial from the courtroom to the theater, and stated as a reason therefor: 'By reason of the insufficiency of the courtroom to seat and accommodate the people applying for admission, and also by reason of their being some question as to the safety of the building crowded to its full capacity as it is, it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where trial proceeded.' The stage was occupied by court, counsel, jury, witnesses, and officers connected with the trial. The theater proper was crowded with curious spectators. Before the trial was completed it was

returned to the courtroom and concluded there. At the adjournment of court on one occasion the bailiff announced from the stage: 'The regular show will be tomorrow; matinee in the afternoon and another performance at 8:30. Court is now adjourned until 7:30.' The court manifested no disapproval of this announcement. The defendant now insists that such proceedings were prejudicial to the calm consideration of his cause to which he was entitled. The law requires that trials shall be public, but this requirement is satisfied by admitting those who could conveniently be accommodated in the courtroom where the law requires such trials to be held (Rev. St. 1913, sec. 1162), without interrupting the calm and orderly course of justice."

"PRACTICING MEDICINE" AS INCLUDING CHIROPRACTOR.—That a chiropractor is within the terms of a statute providing that any person shall be regarded as practicing medicine who shall for compensation "diagnose, treat, operate upon or prescribe or advise for any physical or mental ailment" is the decision in Board of Medical Examiners *v.* Freenor, 47 Utah 430, 154 Pac. 941, reported and annotated in Ann. Cas. 1917E 1156. The court said: "The law is not concerned with the question of whether chiropractic is as good as or better than other systems of treatment. It is concerned with the question that before any one shall undertake, no matter by what system, to diagnose, treat, operate upon, or prescribe or advise for any physical or mental ailment or condition of another for a fee or other consideration, he shall possess the learning and skill required by the statute and produce a degree or diploma from a college meeting the requirements enumerated in the statute, and successfully pass an examination before the board showing his competency. When he does that, then he can practice whatever system he may consider the most efficacious, or do that in a given case which he thinks will produce the best result. Until he does that he cannot practice at all, unless he comes within the exception of the statute, 'those who heal only by spiritual means without pretending to have any knowledge of the science of medicine,' an exception put in the statute to permit treatment by Christian Science or other spiritual means. When we look to the testimony of the defendant's patients, it very clearly appears that he not only diagnosed physical ailments and abnormal conditions, but also treated them. One of them he diagnosed as 'St. Vitus's dance;' another 'a goiter;' another 'spleen anaemia;' another 'diabetes;' another as 'a worn-out condition' and 'lack of blood circulation;' and all of them as displaced or subluxed vertebrae, some at six or eight places. These he manipulated and adjusted to remove the cause producing the ailments which he said the patients had. That such is diagnosing and treating an ailment or condition of another cannot successfully be gainsaid."

STATE "WORKMEN'S COMPENSATION ACT AS APPLICABLE TO MARITIME EMPLOYEES.—A decision of the United States Supreme Court, said by Mr. Justice Pitney to be one involving "momentous consequences," is that of Southern Pac. R. Co. *v.* Jensen, 244 U. S. 205, 37 S. Ct. 524, also reported with note in Ann. Cas. 1917E 900. The important holding in that case was that the Workmen's Compensation Act of New York, as applied by the state court to a fatal injury sustained by a stevedore while engaged in work of a maritime nature upon navigable water within that state, conflicted with the Constitution of the United States and the act of Congress confirming admiralty and maritime jurisdiction in civil cases upon the district courts of the United States, and was to that extent invalid. Four justices dissented. The prevailing opinion was written by Justice McReynolds and was in part as follows: "The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52, 59, 60, 34 S. Ct. 733, 58 U. S. (L. ed.) 1208, 1212, 51 L. R. A. (N. S.) 1157. If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien condemned in the Roanoke. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid. Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, 'saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.' The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."

VALIDITY OF STATUTE PROHIBITING GIVING OF INFORMATION, ETC., FOR PREVENTION OF CONCEPTION.—The case of People *v.* Sanger, 222 N. Y. 192, passes on the constitutionality of section 1142 of the New York Penal Law which among other things makes it a misdemeanor for a person to sell or give away, or to advertise or offer for sale, any instrument or article, drug or medicine, for the prevention of conception; or to give information orally, stating when, where or how such an instrument, article or medicine can be purchased or obtained. The case attracted much newspaper attention when on trial in the Court of Special Sessions of the city of New York, where the defendant Margaret Sanger was convicted of violating the section. The Court of Appeals now affirms the conviction holding that the statute is constitutional. Crane, J., writing the opinion of the court, says: "Some of the reasons assigned below for the illegality of this act have now been abandoned and it is conceded to be within the police power of the legislature, for the benefit of the morals and health of the community, to make such a law as this applicable to unmarried persons. But it is argued that if this law be broad enough to prevent a duly licensed physician from giving advice and help to his married patients in a proper case, it is an unreasonable police regulation, and, therefore, unconstitutional. There are two answers to this suggestion. In the first place, the defendant is not a physician, and the general rule applies in a criminal as well as a civil case that no one can plead the unconstitutionality of a law except the person affected thereby. . . . Secondly, by section 1145 of the Penal Law, physicians are excepted from the provisions of this act under circumstances therein mentioned. . . . This exception in behalf of physicians does not permit advertisements regarding such matters, nor promiscuous advice to patients irrespective of their condition, but it is broad enough to protect the physician who in good faith gives such help or advice to a married person to cure or prevent disease. 'Disease,' by Webster's International Dictionary, is defined to be 'an alteration in the state of the body, or of some of its organs, interrupting or disturbing the

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performance of the vital functions, and causing or threatening pain and sickness; illness; sickness; disorder.' The protection thus afforded the physician would also extend to the druggist, or vendor, acting upon the physician's prescription or order. Much of the argument presented to us by the appellant touching social conditions and sociological questions are matters for the legislature and not for the courts."

VALIDITY OF ORDINANCE REGULATING KEEPING OF CATTLE WITHIN MUNICIPAL LIMITS.—A municipal ordinance making unlawful the maintenance of stock pens within 300 feet of any hotel or private residence in the municipality without a permit from the city council, and providing that the words "stock pen" should include any lot wherein more than six head of cattle were kept was held in Ex p. Broussard, 74 Tex. Crim. 333, 169 S. W. 660, to be a proper exercise of the city's police power, and not unconstitutional because the council might act arbitrarily, since it would be presumed that it would not do so, and if it did the person aggrieved would have an adequate remedy by mandamus. The case is reported in Ann. Cas. 1917E 919 and exhaustively annotated. The court was not unanimous as to the validity of the ordinance there being a dissenting opinion by Davison, J., who said: "I have been unable to agree with the conclusion of the majority as expressed in Judge Harper's opinion. I believe the legal propositions relied upon and presented by relator correctly present the law of the case. These propositions have been ably and forcefully stated by his counsel in their brief and written argument and so clearly reasoned and supported by authority they should have been sustained. So believing, I requested his counsel, Messrs. Dougherty & Gordon and Messrs. W. F. Ramsey and C. L. Black to formulate and state the propositions of law applicable to the case to form the basis of my dissenting opinion. They have done so, and so clearly and ably I have thought it but just and appropriate to adopt their statement of the law as my dissenting opinion, which I now do, which is as follows: 'The ordinance under review in this case, in effect, prohibits any person from keeping more than six head of stock within 300 feet of any hotel or private residence in the City of Beaumont without first obtaining a permit from the city council. The ordinance contains 110 conditions regulating the issuance of permits by the city council. It prescribes no conditions, upon the satisfaction of which the applicant for a permit would become entitled to same and entitled to enforce his right to same in the courts by proper remedy. The whole matter, under the terms of the ordinance, is left within the unconditioned and consequently uncontrollable discretion of the city council. Under the terms of this ordinance, the city council may grant a permit to one person and refuse it to another under the same circumstances, and there would be, if the ordinance is valid, no legal remedy for the person to whom a permit is refused. I think the overwhelming weight of authority condemns such an ordinance as void, upon the ground that it subjects the right to the lawful ownership and use of the property to the unconditioned and arbitrary discretion of the city officers."

EFFECT OF INCONTESTABLE CLAUSE IN LIFE INSURANCE POLICY.—In Duvall *v.* National Ins. Co., 28 Idaho 356, 154 Pac. 632, reported and annotated in Ann. Cas. 1917E 1112, one of the questions was whether a clause in a life insurance policy providing that "this policy is incontestable from its date, except for non-payment of premiums" precluded any defense after the stipulated period on account of false statements in the application for the policy, even though they were fraudulently made. It was held that the clause precluded any such defense, but in a dissenting opinion Morgan, J., said: "It appears to me the foregoing decision violates some elementary principles of law. We must not overlook the fact that the case has not been tried upon its merits; that it was decided upon demurrer to the answer, and that the answer properly and sufficiently alleged fraud upon the part of the insured whereby he procured appellant to issue to him the policy of life insurance which forms the basis of this action. This state of facts invites the application of the fundamental rule that the demurrer admits all matters of fact which are sufficiently pleaded. (Bouvier's Law Dict. Rawle's Third Rev. 841.) So, although life insurance companies have competent physicians to thoroughly examine an applicant, and although it is the company's duty before issuing its policy to thoroughly satisfy itself as to his physical condition, and although it is well recognized that many people have ailments they know not of that might have a tendency to make them subject to attacks of pneumonia and other diseases, and although it is a well-recognized fact that pneumonia often attacks robust men and causes death in a very short time, nevertheless, for the purposes of this case, it must be taken as admitted that insured, knowingly and purposely, tricked and defrauded appellant into entering into the contract here sued upon, and that it would not have entered into it had it not been so tricked and defrauded. Since the fraud is admitted by the demurrer, its effects upon the contract is stated in another fundamental rule as follows: 'It may be laid down as a general rule that any false representations of a material fact, made with knowledge of its falsity, and with intent that it shall be acted upon by another in entering into a contract, and which is so acted upon, constitutes fraud, and will entitle the party deceived thereby to avoid the contract or to maintain an action for the damages sustained.' . . . Another rule generally accepted and applied throughout the United States is: A provision in a contract of life insurance that it shall be incontestable from date is void, as against public policy, so far as it tends to exclude the insurer from contesting upon the ground of fraud in procuring the contract. . . The application of this rule ought not to be questioned, much less denied, in Idaho, where the policy of the law has been expressed in the statutes and the length of time within which such contracts are contestable has been definitely fixed."

## News of the Profession

THE WYOMING STATE BAR ASSOCIATION held its annual meeting at Douglas, Wyo., on January 28 and 29.

OHIO JUDGE RESIGNS.—Municipal Judge William C. Keough of Cleveland, Ohio, resigned from the bench on February 1.

THE COUNTY ATTORNEYS' ASSOCIATION OF COLORADO met in annual convention at Denver, Colo., on January 24.

KENTUCKY JUDGE DEAD.—Circuit Judge Sam V. Dixon of the Fifth Judicial District of Kentucky, died at Henderson, Ky., on January 30.

KANSAS DISTRICT JUDGES MEET.—The eleventh annual meeting of the district court judges of Kansas was held at Topeka, Kan., on January 29.

THE AMERICAN BAR ASSOCIATION has chosen Cleveland, O., as the place for its next annual convention, which will be held on August 28, 29 and 30, 1918.

VIRGINIA JUDGE RESIGNS.—Judge Richard Warner Peatross, of the Danville, Va., Corporation Court, has resigned from the bench on account of ill health.

DEATH OF OHIO JURIST.—Alfred G. Carpenter, judge of the Ohio Court of Appeals, Eighth Judicial District, died at Cleveland, O., on February 1, aged 68 years.

FEDERAL JUDGE RESIGNS.—Van Vechten Veeder, Federal Judge for the Eastern District of New York, has resigned from the bench to resume the practice of law.

DEATH OF UTAH JUDGE.—George Francis Goodwin, judge of the District Court of Utah, Third Judicial District, died at Salt Lake City on January 19, aged 69 years.

NEW JUDGE IN ARIZONA.—Governor Hunt of Arizona has appointed Paul C. Thorne of Oatman to the bench of the Superior Court of Mohave county, to succeed Judge John A. Ellis, resigned.

DEATH OF MASSACHUSETTS JUDGE.—Judge Charles Edward Shattuck, appointed to the bench of the Massachusetts Superior Court by Governor McCall last November, died at Boston, Mass., on January 29.

NAMED APPELLATE JUDGE IN OHIO.—Governor Cox of Ohio has appointed Thomas S. Dunlap of Cleveland to the bench of the Court of Appeals of the eighth district to succeed the late Judge A. G. Carpenter.

EMINENT OREGON LAWYER DEAD.—Julius C. Moreland, clerk of the Oregon Supreme Court, and one of Oregon's most eminent lawyers, died suddenly at Salem, Ore., on February 2, aged 73 years.

NAMED CIRCUIT JUDGE IN KENTUCKY.—John L. Dorsey of Henderson has been appointed by Governor Stanley of Kentucky to succeed the late Judge Sam V. Dixon as circuit judge of the Fifth Judicial District.

DEATH OF FORMER FEDERAL JUDGE WING.—Francis J. Wing, United States District Judge from 1901 to 1905 by appointment of President McKinley, died at Cleveland, Ohio, on February 1, aged 68 years.

MADE ASSISTANT FEDERAL ATTORNEY.—George E. Kelleher of Boston has been appointed by Attorney General Gregory as special assistant United States attorney for Massachusetts to assist in work incidental to the war.

APPOINTED TO BENCH IN UTAH.—Robert B. Porter of Salt Lake City has been appointed by Governor Bamberger of Utah as judge of the Third Judicial District to fill the vacancy caused by the death of Judge George F. Goodwin.

DEATH OF OREGON STATESMAN.—Charles W. Fulton, ex-United States Senator from Oregon, a prominent lawyer and for many years an active figure in the politics of that state, died at Portland, Ore., on January 27, aged 65 years.

APPOINTED UNITED STATES SENATOR.—John F. Nugent, a prominent lawyer and politician of Boise, has been appointed United States Senator by Governor Alexander of Idaho to fill the vacancy caused by the death of Senator Brady.

CHANGE ON SOUTH CAROLINA BENCH.—Mendel L. Smith has resigned from the bench of the Fifth Judicial Circuit of South Carolina, to accept a commission in the United States army, and William H. Townsend of Columbia has been elected by the joint assembly to fill the vacancy.

ALABAMA JURIST DEAD.—Oliver J. Semmes, son of Admiral Raphael Semmes, commander of the Confederate frigate Alabama, died at Mobile, Ala., on January 19, aged 79 years. He served throughout the civil war with the Confederate army and for forty years was judge of the City Court of Mobile.

CONNECTICUT STATE BAR ASSOCIATION.—The annual meeting of the Connecticut State Bar Association was held at Hartford, Conn., on January 28. Addresses were delivered by William F. Henney, president of the association, and by former United States Senator Theodore E. Burton of Ohio.

DEATH OF DISTINGUISHED NEW ENGLAND LAWYER.—Samuel J. Elder, one of the leading lawyers of New England and one of senior counsel for the United States before the Hague tribunal in the North Atlantic fisheries arbitration with Great Britain in 1910, died suddenly at Boston, Mass., on January 22, aged 68 years.

PROBATE JUDGES ELECT OFFICERS.—At the recent annual convention of the Association of Probate Judges of Ohio, held at Cincinnati, O., the following officers were elected for the ensuing year: President—Judge William H. Leuders, of Cincinnati; vice president—Judge Harvey C. Smith, of Zanesville; secretary—Judge George W. Tchau, of Springfield; treasurer—Judge E. A. Brown, of Circleville.

NOTED CALIFORNIAN DEAD.—Carter P. Pomeroy, a well known attorney of San Francisco and for twenty-five years reporter of decisions of the California Supreme Court, died at San Francisco on February 2, aged 59 years. Mr. Pomeroy was the son of the late John Norton Pomeroy, senior professor at Hastings Law College and one of the best known authorities in America on equity jurisprudence.

KANSAS STATE BAR ASSOCIATION.—The thirty-fifth annual convention of the Kansas State Bar Association was held at Topeka, Kan., on January 30 and 31. Scheduled addresses included the following: "Lawyers and Warriors," by Capt. James W. Finley, of Camp Funston; "State Public Utility Control," by H. O. Caster, of Topeka; "A Week in the Courts of England," by Justice W. D. Evans, of the Iowa Supreme Court.

TO BE ADVISER TO KING OF SIAM.—Prof. Eldon R. James, former Cincinnati lawyer and dean of the law department of the University of Missouri, has been appointed legal adviser in foreign affairs to the Siamese government. Prof. James was the first man to take the degree of Doctor of Jurisprudence at Harvard, and was subsequently professor of law at the University of Wisconsin and the University of Minnesota.

FEDERAL JUDGE PUTNAM DEAD.—Judge William L. Putnam, a member of the United States Circuit Court of Appeals, first circuit, for 25 years, died at Portland, Me., on February 5, aged 83 years. He retired last Fall because of illness, which forced him to relinquish many activities, including representation on the board of trustees of Bowdoin College, from which he was graduated in 1855. Because of his intimate knowledge of English law he was named by President Cleveland in 1887 as a commissioner to negotiate with Great Britain in establishing and defining the rights of American fishermen in Canadian waters.

DEATH OF NEW HAMPSHIRE JUDGE.—William M. Chase, Associate Justice of the New Hampshire Supreme Court from 1891 to 1907, died at Concord, N. H., on February 3, aged 80 years. Justice Chase had figured prominently in public activities aside from his work as a jurist. He was a member of the State Senate from 1909 to 1911 and was a trustee of Dartmouth Col-

lege for many years. He was graduated from Dartmouth in 1858 and later received the honorary degree of A. M. and LL.D. from that institution. He was chairman of a commission which codified and revised the public laws of the State just before his elevation to the Supreme bench.

NOTED FRENCH LAWYER DEAD.—Louis Renault, a permanent delegate to The Hague peace tribunal and international law adviser to the foreign office, died at Barbizon, France, on February 8. He had been connected with every important negotiation of the French government for about twenty years and notably in the negotiations with Germany over Morocco. He was one of the delegates of France at the Algeciras conference and was active in the subsequent negotiations with Germany in 1908 and 1911. M. Renault was known throughout Europe as an authority on international law, and French governments for a generation had regarded him as one of the soundest of counselors. Recently he had been studying a project for an international league of nations after the war.

## English Notes*

AN AMAZING MISTAKE.—There was an amusing incident at the opening of the Official Air Service Exhibition in Dublin recently. The opening ceremony was to be performed by his Excellency the Lord-Lieutenant at a quarter to three. At that hour the Lord Justice arrived, and the military band at once commenced playing, and a soldier in uniform sang the National Anthem. Sir James Campbell was clearly mistaken for the Lord-Lieutenant. At the conclusion the Lord Chief Justice said from the platform: "There has been a slight mistake. This demonstration is a little premature. His Excellency has not yet arrived, but is expected every minute." There was much amusement expressed when the facts became known to the general body of those present. The Chief Justice's allusion to the affair as a slight mistake was excellent, as there is a "slight" difference in the personal appearance of the two men.

WAIVER OF DIPLOMATIC PRIVILEGE.—No more than declaratory of the common law was section 3 of the Diplomatic Privileges Act 1708 (7 Anne, c. 12), as has been pointed out in several cases. And the recitals to the Act show the circumstances in which it was passed. It prescribed that all writs and processes which should thereafter be sued for, whereby the person of any public Minister of any foreign State might be imprisoned or his goods be seized, should be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever. What the effect is of appearing to a process which is null and void does not seem to be quite evident, according to Lord Justice Scrutton's view of that point, as stated by his Lordship in the case of Re Suarez; Suarez *v.* Suarez, which came recently before the Court of Appeal, consisting of Lords Justices Swinfen Eady, Warrington, and himself. The learned judge expressed his desire to reserve his liberty to consider how exactly a writ issued without the consent of an ambassador, and, therefore, apparently a nullity—see Musurus Bey *v.* Gadban (71 L. T. Rep. 51; (1894) 2 Q. B. 352)—is made an effective writ by the consent of the defendant, and the extent to which it becomes effective. In the present case his Lordship thought that the facts prevented the defendant from raising the point. So far as Lords Justices Swinfen Eady and Warrington were concerned, the doubt entertained by Lord Justice Scrutton was not seemingly shared in by their Lordships. In the opinion which they entertained, an ambassador or other foreign Minister can, with the consent of his Sovereign, submit to the jurisdiction of the courts of the country to which he is accredited. The decision of the Court of Common Pleas in 1854 in Taylor *v.* Best (14 C. B. 487) was considered to be one of numerous authorities for that proposition. If a Sovereign can submit to the jurisdiction, why cannot an ambassador or other foreign Minister with the consent of his Sovereign, was the way in which it was put by Lord Justice Swinfen Eady. The view taken by his Lordship and Lord Justice Warrington was that, in the present case, the defendant, while he was Minister, by the direction or with the consent of his Government, the Republic of Bolivia, expressly waived his diplomatic privilege.

VALIDITY OF AGREEMENT TO LEND CLOTHES TO WIFE.—The question that arose in the recent case of Rondeau Le Grand and Co. *v.* Marks (noted 143 L. T. Jour. 394) was whether a husband, in fulfilling his common-law obligation to provide his wife with clothes, is bound to give them to her, or whether he has done all that can be required of him by lending them to her. No doubt when a husband provides his wife with clothes the ordinary presumption is that he intends that they should be a gift, but this presumption may be rebutted, as it was rebutted in the present case, by proving an agreement between the spouses that the property, which was originally in the husband, he having paid the purchase price, should remain in the husband, and that the wife should wear the clothes during his pleasure, but should not own them. Before the Married Women's Property Act 1882, all the clothing that the husband provided, including the paraphernalia, remained his property, and could be seized by his creditors. By the statute a wife was enabled to become the legal owner of property, but that did not pass the property in clothes which belonged to the husband ipso facto into the wife. It was said further that the agreement between husband and wife that the clothes should be the property of the husband required consideration, and none could be stated, as there could be no consideration in a husband fulfilling his legal obligation. In the Court of Appeal Lord Justice Pickford took the view that the agreement was only an agreement in a popular sense, being no contract in a strict legal sense and requiring no consideration, while Lord Justice Bankes took the view that if consideration were necessary it could be stated, the agreement being with reference to clothes other than and beyond those which would be covered by the husband's common-law obligations. Mr. Justice Sargant further pointed out that, if the agreement was void from lack of consideration or otherwise, the property which was originally in the husband remained in the husband, and was none the more on those accounts available to be taken in execution by the wife's creditors. As a practical result of the case it is quite clear, therefore, that a husband and wife may make a valid agreement by which the husband may from time to time lend his wife clothes, the property remaining in the husband and the clothes not being liable to be taken into execution by the wife's creditors.

THE JUSTIFIABLE REPUDIATION OF TREATIES.—Sir Edward Carson, speaking at the Mansion House recently, in one sentence enunciated the weakness, through lack of a sanction by which it can be enforced, of the whole system of international morality. "Talk to me of treaties! Talk to me of a League of Nations! Every great Power in Europe was pledged by treaty to preserve Belgium; that was a League of Nations, but it failed." The recognized grounds on which, in accordance with the prin-

* With credit to English legal periodicals.

ciples of international morality as expounded by its highest authorities, treaties may become voidable are by the operation of subsequent events or by changes in the internal life of a State. So unstable are the conditions of international existence, and so difficult is it to enforce a contract between States after the state of facts upon which it was founded have substantially changed, that all such agreements are necessarily made subject to the general understanding that they shall cease to be obligatory as soon as the conditions on which they were executed are essentially altered. Then, again, treaties can be, in accordance with the principles of international morality, affected by changes in the internal life of a State. A treaty, for example, which was not intended to be a menace to the independence of a State at the time of its execution becomes voidable the moment subsequent events invest it with that character, just as a treaty made in contemplation of a particular form of government in one or other of the contracting States may be terminated because of internal constitutional changes, or when one of the states enters into a position of subordination. To those recognized and legitimate grounds upon which a valid treaty may become voidable in accordance with the principles of international morality Heffter adds the doctrine that a State may repudiate a treaty when it conflicts with the rights and welfare of its people, and Fiore advances the proposition that all treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation or which hinder the exercise of its natural rights. Professor Lawrence holds that "when and under what conditions it is justifiable to disregard a treaty is a question of morality rather than of Law." Sir Edward Carson's views on the futility of treaties and of the League of Nations cannot be controverted till the ideal of Mr. Gladstone and, in the present generation, of Mr. Asquith is realized of the establishment of a tribunal to adjudicate on the differences between members of the family of nations, and with full power to enforce its decisions under the provisions of international morality translated into international positive law.

Incapacity for Work Resulting from Injury.—With reference to the words "where death results from the injury," in section 1 (a) (i) of the first schedule to the Workmen's Compensation Act 1897 (60 & 67 Vict. c. 37)—re-enacted by a sub-section bearing precisely the same numbering in the first schedule to the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58)—the Court of Appeal in Dunham *v.* Clare (86 L. T. Rep. 751; (1902) 2 K. B. 292) thus laid down the rule to be observed: A workman's death may "result from the injury" which he has sustained although it is not the natural and probable consequence of the injury. And if death does in fact so result, compensation is payable to the dependents of the deceased workman. In other words, it is not essential that it should be established that the death of the workman was the natural and probable consequence of the injury, so long as the chain of causation is complete and unbroken by any *novus actus interveniens*. Later on in the same sub-section, it will be remembered, there follow the words "where total or partial incapacity for work results from the injury." And with reference to them, the same rule that had been enunciated in Dunham *v.* Clare (ubi sup.) was applied in Ystradowen Colliery Company *v.* Griffiths (100 L. T. Rep. 896; (1909) 2 K. B. 533). It was on the strength of those decisions that the learned judges of the Court of Appeal—Lords Justices Swinfen Eady, Warrington, and Scrutton—based their conclusion in the recent case of Saddington *v.* Inslip Iron Company, Limited. The learned County Court judge having found that the workman's total incapacity for work was septic poisoning due to microbes entering his frost-cracked hand at a particular time on a specified date, the learned Lords Justices were unable to agree with his decision that the workman had not suffered "personal injury by accident arising out of and in the course of" his employment, within the meaning of section 1 of the Act of 1906. As was pointed out by Lord Justice Scrutton, if an accident has caused incapacity for work, it is immaterial that some other cause has come into play and increased that incapacity by acting on the incapacity caused by the accident. For that proposition his Lordship considered that Brown *v.* George Kent Limited (6 B. W. C. C. 745) was an authority. It was unnecessary to find where the microbes which caused the additional injury came from, said Lord Justice Scrutton. If the additional injury was caused to an injury already caused by "accident arising out of and in the course of the employment" that was all-sufficing according to the decision in Brown *v.* George Kent Limited. Frost cracks caused by workman working in severe wintry weather are by no means unusual, and septic poisoning supervening may always be anticipated as a likely consequence. But the present decision has a much wider application, it is obvious, than to that kind of accident merely.

Scriptural Allusions in Court.—In one of his letters, written in 1830, Charles Lamb, after referring to certain peculiarities of his friend Martin Burney (who, although he died in 1852, had the curious distinction of having his name retained in the list of counsel published in the Law List till the year 1878) adds: "He came down here and insisted on reading Virgil's 'Aeneid' all through with me (which he did) because a counsel must know Latin. Another time he read out all the Gospel of St. John, because Biblical quotations are very emphatic in a court of justice." Not all lawyers, however, have taken the like pains as Mart Burney to familiarize themselves with Biblical phrases. A curious example of lack of familiarity with what ought to be known by everyone is furnished by an anecdote, preserved in the latest number of the American Law Review, of an American judge of a past generation who was much admired for his literary attainments. On quoting to a friend some lines of Byron as particularly fine, the friend replied: "Yes, pretty; almost equal to the words of Habakkuk: 'He stood and measured the earth . . . and the everlasting mountains were scattered, the perpetual hills did bow.'" Continuing, the friend said: "Judge, you're a lawyer; have you ever read a finer piece of forensic eloquence than Paul's defense before Agrippa?" The judge pondered and replied: "I don't think I ever heard of him, the first man you quoted from, but it seems I have heard of that defense you refer to, though I cannot recall anything about it. Before what court was that speech made, and was it ever published? I'd like to read it." It might seem that the retailer of the anecdote was indulging in romance, but as there is a legend that a member of the English Bar, who passed away some years ago, went sadly astray as to what was "the writing on the wall," and a well-authenticated story of a Scottish lawyer who was altogether ignorant of the parable of the Ten Virgins, the American judge's lack of acquaintance with St. Paul's defense may have been genuine. Although Dr. Johnson disapproved the introduction of Scripture phrases and allusions in ordinary speech, there can be little doubt that their use may at times be remarkably effective. The late Lord Coleridge, both while at the Bar and on the Bench, introduced them at times with great skill and propriety. But on one occasion a Scriptural allusion was cleverly used against him. This was in the case of Saurin *v.* Starr, which arose out of the plaintiff having been compelled to leave a certain convent owing to the alleged breach by her of certain of its rules. Coleridge appeared for the plaintiff, and his cue was to ridicule the triviality of the rules. A Mrs. Kennedy, the mistress of the novices,

gave evidence that the plaintiff had been found in the pantry, eating strawberries, when she ought to have been attending to a class of poor children. The cross-examination proceeded thus:—Coleridge: "Eating strawberries, really!" Mrs. Kennedy: "Yes, sir, she was eating strawberries." Coleridge: "How shocking!" Mrs. Kennedy: "It was forbidden, sir." Coleridge: "And did you, Mrs. Kennedy, really consider that there was any harm in that?" Mrs. Kennedy: "No, sir, not in itself, any more than there was any harm in eating an apple; but you know, sir, the mischief that came from that."

OVERHANGING TREES.—The recent case of Cheater *v.* Cater (117 L. T. Rep. 335; [1917] 2 K. B. 516; on appeal, 144 L. T. Jour. 93) calls attention to an interesting little point, namely, the rights of adjoining owners in respect of trees planted on the land of one of them, but overhanging the land of the other. The basic principle appears to be that established by Rylands *v.* Fletcher (19 L. T. Rep. 220; L. Rep. 3 H. L. 330), namely, that where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbor, he will not be liable in damages. But if he brings on his land anything which would not naturally come upon it, and which is in itself dangerous and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned. The following propositions appear to be established, namely: (1) Of two adjoining owners between whom there is no privity of contract, one cannot bring on his land, or having done so, permit to remain thereon, a poisonous tree so as to project over the land of the other (Crowhurst *v.* Amersham Burial Board, 39 L. T. Rep. 355; 4 Ex. Div. 5; and Smith *v.* Giddy, 91 L. T. Rep. 296; (1904) 2 K. B. 448); (2) the owner of land which is overhung by trees growing on his neighbor's land is entitled, without notice, if he does not trespass on his neighbor's land, to cut the branches so far as they overhang, though they may have done so for more than twenty years (Lemmon *v.* Webb, 71 L. T. Rep. 647; (1895) A. C. 1); (3) if a landowner keeps a poisonous tree within his boundary he is not responsible if his neighbor's cattle trespass and are thereby poisoned, as there is no duty on the landowner to take means to prevent his neighbor's horses from having access to the branches of the trees (Ponting *v.* Noakes, 70 L. T. Rep. 842; (1894) 2 Q. B. 281); (4) there is no implied warranty on the part of a lessor who lets land for agricultural purposes that no noxious plants are growing on the demised premises (Erskine *v.* Adeane, 29 L. T. Rep. 234; L. Repp. 8 Ch. 761). In that case Lord Justice Mellish said: "A tenant, when he takes a farm, must look and judge for himself what the state of the farm is. . . . I never heard that a landlord warranted that the sheep should not eat his yew trees. . . . In my opinion, the lessee must take his chance of such a damage, or ask for an express warranty." In Cheater *v.* Cater the facts were very shortly as follows: The defendant let to the plaintiff a field. At the time of the demise a yew tree was growing on the land retained by the landlord which yew tree apparently overhung the demised property, but it was not proved that the tree could not be reached by cattle or horses at the date of the letting, or that during the tenancy it grew and came within reach of the plaintiff's horses. One of the horses ate of the leaves and was poisoned. It was held by Mr. Justice Rowlatt, affirming the County Court judge of Gloucestershire (Mr. Justice Coleridge dissenting), following the view of Lord Justice Mellish in Erskine *v.* Adeane, that the landlord was not liable. An appeal from that decision was dismissed. Lord Justice Pickford considered that the statement of law by Lord Justice Mellish in Erskine *v.* Adeane was correct, and was something more than a dictum. The Court of Appeal decided nothing as to what the position would be if the branches, safe at the time of the demise, had become dangerous to the horses during the demise.

RIGHT OF PURCHASER OF LAND TO DAMAGES FOR LOSS OF BARGAIN.—It is a wholesome rule that persons should observe their contracts, or pay damages for the breach of them, and this rule prevails as to goods. But, owing to the difficulties which often arise in showing a good title to land in this country, it was decided in Flureau *v.* Thornhill (2 W. Bl. 1078) that a purchaser of land is not entitled to compensation for loss of his bargain where the vendor, through want of title or otherwise, having acted in good faith, is unable to convey the estate; but the purchaser can recover merely his expenses in and about the attempted purchase. That rule was adopted and confirmed by the House of Lords in Bain *v.* Fothergill (31 L. T. Rep. 389; L. Rep. 7 H. L. 158). The rule, however, does not apply where the breach of contract arises not from the inability of the vendor to give a good title, but from his refusal to take the necessary steps to carry out the contract: (see Engell *v.* Fitch, 18 L. T. Rep. 318; L. Rep. 4 Q. B. 659). That was a case where the defendants, mortgagees of a house with a power of sale, sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The mortgagor was in possession and refused to give it up. On the purchaser requiring possession before completing the purchase, the vendors affected to rescind the contract. It was held by the Exchequer Chamber (affirming the judgment of the Court of Queen's Bench) that as the breach of contract arose not from inability of the defendants to make a good title, but from their not having taken the necessary steps to secure possession, the case did not come within the principle of Flureau *v.* Thornhill, and that the plaintiff was entitled to recover, not only his deposit and the expenses of investigating the title, but also damages for the loss of his bargain, and that the measure of damages was the difference between the contract price and the value at the time when the contract was broken. Again, in Day *v.* Singleton (81 L. T. Rep. 306; (1899) 2 Ch. 320) on a sale of leasehold property, which the vendor could not assign without a license from his lessor, it was held by the Court of Appeal that the purchaser was entitled to damages (beyond the return of the deposit, with interest and expenses) for loss of his bargain, by reason of the vendor's omission to do his best to procure such license. As was observed by Lord Hatherley in Bain *v.* Fothergill: "Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do, by force and of his own interest, and also by force of the interest of others whom he can compel, to concur in the conveyance." (With submission, the word "conveyance" would seem more appropriate than the word "conveyancing" in that passage, because a question of title comes within the term "conveyancing," though it is not a matter of "conveyance.") The point came before Mr. Justice Sargant in the recent case of Re Daniel; Daniel *v.* Vassell (117 L. T. Rep. 472; (1917) 2 Ch. 405). There a testator agreed to sell a house which, with an adjoining hotel, was subject to one mortgage. After his death the title was accepted by the purchasers, but the mortgagees refused to release the property sold from their mortgage, and the vendor's executors had not enough funds of the estate to redeem the mortgage. It was held that the purchasers were entitled to general damages for loss of bargain, and not merely to costs of investigating the title. Mr. Justice Sargant, after referring to the cases, said: "It seems to me that these cases establish that contracts for sale of real estate, like other con-

tracts for sale, cast on vendors a general liability for damages for non-fulfillment, subject only to an exception in a very special and limited class of cases, and that unless a case is brought within that special class the general rule applies." It may be that, under a well-drawn power to rescind, the vendor would be able to escape liability to damages, but even such a clause is not likely to avail him if he acts arbitrarily or unreasonably, or if he has been guilty of dishonesty, or, knowing the defect of his own title, has recklessly entered into the contract for sale: (see Quinion *v.* Thorne (1906) 1 Ch. 596; and Re Jackson Haden's Contract, 94 L. T. Rep. 418; (1906) 1 Ch. 412).

## Obiter Dicta

HAPPY THOUGH MARRIED.—Jolly *v.* Single, 16 Wis. 298.

A WICKED CITY.—City of Chicago *v.* Lord, 276 Ill. 544.

AN EXPENSIVE SUIT.—Kostachek *v.* Kostachek, 40 Okla. 747.

SYNONYMY.—In Chicago, etc., R. Co. *v.* Kindlesparker, 234 Fed. 1, the defendant in error was a locomotive fireman.

LIKEWISE LITIGANTS.—"Lawyers and judges know that juries are not always fair."—Per Dawson, J., in Underwood *v.* Fosha, 96 Kan. 246.

HOT AIR!—"A gasoline fire . . . is neither dilatory nor docile."—Per Evans, J., in Providence Washington Ins. Co. *v.* Iowa Tel. Co., 172 Iowa 606.

A FLASH IN THE PAN.—In Flash *v.* Louisiana Western R. Co., 137 La. 352, the plaintiff won in the trial court, but on appeal the judgment was reversed and the suit dismissed.

SPEAKING OF LOVE?—"We see the effects of the laws of gravitation, but who has seen the power which attracts one atom to another?"—Per Jones, J. in Montgomery County *v.* Cochran, 116 Fed. 1000.

STILL ACCURATE.—"Brooklyn, a considerable town, opposite to New York."—Per Hopkinson, J., charging a jury in 1829, in U. S. *v.* Kessler (C. C. Pa.) 25 Fed. Cas. No. 15,528 (at p. 770).

SO WITH PARTY LINES.—"Two telephone systems serving the same constituency place a useless burden upon the community, cause sorrow of heart and vexation of spirit, and are altogether undesirable."—Per Burch, J., in Janicke *v.* Washington Mutual Tel. Co., 96 Kan. 309.

GRAND LARCENY NOW!—In Gregory *v.* Wilson, 36 N. J. Law 315, decided forty-five years ago, Chief Justice Beasley said: "Other cases having the same bearing might be cited, but in these days, when legal knowledge is so dearly acquired, and legal learning is so cheaply displayed, a voluminous citation of authorities is apt to look like a petit larceny on the digests."

IN THE PURGATORIAL PRISON?—The New York *World* of January 24 contained an item to the effect that a New Jersey man named Mowser had been sentenced to prison for life for having committed murder, and that in the afternoon of the same day another judge imposed an additional sentence of fifteen years in jail for the crime of robbery. The inevitable conclusion would seem to be that the second judge assumed extra-territorial jurisdiction.

NOT SO MALAPPROPRIATE.—A correspondent firm of attorneys in Spokane, Wash., sends us the following extract from a letter recently received by the firm, the names only being changed:

Eastport, Washington, December 28, 1917. Smith & Jones, Spokane, Washington. Dear Sirs: I am Mr. C. Caminetta of Eastport. Three years ago you purified the deed between Mr. Thompson and I, etc.

What our correspondents actually did was to bring an action to quiet title to a piece of land.

THE KENTUCKY METHOD.—In these days of the high cost of drinking it is like finding money to be let into the secret of the way they drink in Kentucky. Says the court in Denton *v.* Logan, 60 Ky. 435: "The testimony of the witnesses by whom the plaintiff proved his claim, also conduced to show, in substance, that during the period over which the account extends, the defendant was much about the plaintiff's tavern; that he ate there occasionally and drank a good deal; that, in the expressive language of one of the witnesses, 'He drank with "sideboards" '—that is, put his hand around the top of the glass and heaped it."

SOME MARTHA!—The following curious summons was published in a Salt Lake City newspaper recently:

SUMMONS 23263.

In the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah.

Martha A. Adamson, plaintiff, vs. Andrew Adamson, Jr., and Andrew Adamson, Sr., defendants.—Summons.

The State of Utah to the Said Defendants:

You are hereby summoned to appear within twenty days after service of this summons upon you, if served within the county in which this action is brought, otherwise within thirty days after service, and defend the above entitled action; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which has been filed with the clerk of said court.

This action is brought to dissolve the bonds of matrimony now and heretofore existing between the plaintiff and the defendants, Andrew Adamson, Jr., and Andrew Adamson, Sr.

EVANS, FOLLAND & EVANS,
Attorneys for Plaintiff.

P. O. Address: No. 1022-7 Boston Building, Salt Lake City, Utah. 1-12—2-9

ANOTHER SHAKESPEAREAN CONTROVERSY.—Several months ago we called attention in this column to a Shakespearean controversy between the members of the Supreme Court of North Carolina. Lo, the war is still on! With drawn swords and doubled fists, with the scene of battle changed from The Merchant of Venice to The Taming of the Shrew, and with Chief Justice Clark still in the minority, the learned jurists eagerly renew the fray. The case is Freeman *v.* Belfer, 92 S. E. 486. Dissenting (as usual) from any holding which smacks or even seems to smack of injustice to woman, the Chief Justice starts the ball rolling in this wise: "The state of the English law as to wives, which survived to his day and far later, from those ruder times when the judges (not Parliament) created the discriminations against them, is accurately expressed by Shakespeare, a good lawyer (whether his works were written by Lord Bacon or not), when he made Petruchio say of his wife:

> " 'I will be master of what is mine own,
> She is my goods, my chattels; she is my house,
> My household stuff, my field, my barn,
> My horse, my ox, my ass, my anything.' "

Thereupon, the majority of the court append to their opinion the following: *"Note.*—Petruchio was engaged in the difficult task of taming a shrew (this was in the barbarous times when there were shrews), and he adopted rough measures and intemperate language. He succeeded where the gentler methods of father and sister had failed, and Shakespeare has him to say in conclusion:

> " 'He that knows better how to tame a shrew
> Now let him speak: 'tis charity to show.' "

Thereupon again, the Chief Justice likewise appends to his opinion the following: *"Note.*—The utter absence of rights in the wife as against the husband announced by Petruchio cannot be justified against all wives because his wife was a shrew. Even those who condemn women to inferiority and indignities as punishment inherited from Eve will not support that view."

Whether the Chief Justice's selection of a mouthpiece for Shakespearean law was a trifle unfortunate, it is not for us to say. We can, however, and do say: "Next!"

WORTH READING.—The appellant in Scott *v.* State, (N. D.) 163 N. W. 813, was convicted in the trial court of keeping and maintaining a common nuisance in violation of the prohibitory law of the state. On appeal, the judgment of conviction was affirmed by a majority of the court, but Judge Robinson dissented. In quoting at considerable length from the dissenting opinion, we cheerfully assume the risk of wearying our readers. Every bit of it is worth reading. Said the learned judge: "In a crusade against wrong good people have often done wrongs that would shame the devil. A long conducted and zealous crusade for a special object becomes a hobby which narrows the mind and dulls the mental and moral vision of the crusaders until they at length do evil that good may come. Such has been the grave fault for which the overzealous Jesuits have been banished from many countries. Thus in one crusade against liquor, charity and human kindness have been thrown to the wind and replaced by cruelty. The most drastic and cruel laws have been enacted; jury trials have been denied; personal liberty has been disregarded; witnesses, prosecuting attorneys, and even judges, have been bribed by love or fear or filthy lucre. Detective witnesses are employed and given pay in excess of regular witness fees, and are in the business for their dirty fee. In some cases prosecuting attorneys are allowed a bribe of ten dollars for each count on which a party may be convicted, and the judges—they have reason to fear and tremble for their office if they fail to join the crusade and to manifest their zeal.

"In this case the complaint is under a statute declaring all places to be a common nuisance where intoxicating liquors are sold or kept for sale or gift as a beverage, and where persons resort for the purpose of drinking intoxicating liquors as a beverage. . . . The evidence fails to show that any intoxicating liquors were sold or given away to be drunk as a beverage. The witnesses do not mention the word 'beverage' or any similar word. . . . The testimony does fairly show an occasional drinking of beer in the house of the defendant, but there is nothing to show that the house was a resort for beer drinking, or that it was in any way a disorderly house, or a common nuisance. . . .

"One swallow does not make a summer; one love affair does not make a bawdyhouse. The house must be kept as a resort for illegal and immoral purposes; the wrong must be common or it is not a common nuisance, and the legislature cannot make it otherwise. It is perfectly absurd to say that the keeping of a house wherein one, two, or three drinks are sold or given away is the keeping of a common nuisance.

"In Cana of Galilee there was a wedding feast, and the mother of Jesus was there, and both Jesus and his disciples were called to the marriage, and when they wanted wine the mother of Jesus said unto him: They have no wine. Jesus said unto the servants: Fill the water pots with water. And they filled them up to the brim. Then he said unto them: Draw out now and bear unto the governor of the feast. And they bear it. When the ruler of the feast had tasted the water that was made wine, and knew not whence it was, the governor of the feast said to the bridegroom: Every man at the beginning doth set forth good wine, and when men have well drunk then that which is worse, but thou hast kept the good wine until now. This beginning of miracles did Jesus in Cana of Galilee and manifested forth his glory.

"It cannot be truly said that any person at that feast was guilty of keeping or maintaining a common nuisance, or that in North Dakota the recurrence of such a marriage feast would constitute the keeping or maintaining of a common nuisance. In Scripture drunkenness is everywhere denounced, but on occasions the drinking of wine and even strong drink is commended. Thus we did read: Give strong drink to him that is ready to perish and wine to those that be heavy of heart. Let him drink and forget his poverty and remember his misery no more. Go thy way, eat thy bread with joy, and drink thy wine with a merry heart, for God now accepteth thy works. He brought forth food out of the earth and wine that maketh glad the heart of man.

"And the apostle Paul writes to the Apostle Timothy: Drink no longer water, but use a little wine for thy stomach's sake and thy often infirmities.

"It is right to forbid the sale of drinks to Indians, minors, to some persons of Celtic blood, and to any person who does not know enough to care for himself and his family; but to forbid a taste of wine, beer, ale, or Dublin stout to an Anglo-Saxon or a Teuton, why that is cruelty. And, cruelty, thou art a wickedness.

"The majority opinion says it is virtually conceded that if the testimony as stated be true, it is sufficient to establish the crime alleged. That is a grave mistake. There is no such foolish and false concession, and if there were, it would in no way justify the court in sustaining the conviction. The testimony wholly fails to show that the defendant kept a disorderly house or a common nuisance, or a house in any way given to the sale or drinking of intoxicating liquors, or that he did an injury to any person. Under the rulings of the court, were Christ to come to this state and to keep a house and to repeat the miracle of the marriage feast, he might be convicted and sentenced to the state's prison. That is neither law nor gospel.

"It is a matter of regret that in some cases judges are too ready to give a narrow and cold-blooded construction to drastic

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statutes and to impose on others burdens grievous to be borne, which they themselves touch not with one of their fingers.

"At the Grand Pacific I have a nice, exclusive bachelor apartment ($45 a month). Now, if the Governor, the Bishop, or one of the Justices call on me and I open a bottle of foamy Dublin stout—my elixir of life—and for his stomach's sake or for good fellowship give him a glass and join him in a drink with a thousand earnest wishes for his health and happiness, does that make my nice, exclusive apartment a common nuisance? If I call on the good Bishop, and he treat me to a glass or a bottle of wine, does that turn his palace into a common nuisance? If not, then is there one law for the palace and another law for the cottage? In administering the law we should never forget that the primary purpose of law and government is to build up and not to pull down, to assure the right of all to enjoy and defend life and liberty, to acquire, possess, and protect property, and to pursue and obtain safety and happiness."

# Correspondence

THE NECESSITY OF CONSTITUTIONAL LIMITATIONS.

*To the Editor of* LAW NOTES.

SIR: Referring to my letter and your editorial comment thereon published in your January number:

The British constitution is the growth of centuries. The usages and precedents of ages constitute the foundation of the rights of British citizens.

It is inconceivable that our written constitution could be wiped out in a day and the liberties now enjoyed by the citizens of Great Britain thereby be conferred upon American citizens.

The "anti-constitutionalists" of the United States are composed of two classes; first, the "Bolsheviki," who are opposed to all laws, except the *might* of the proletariat; and, second, the war enthusiasts (mostly officeholders), who claim that our public officials should not be hampered by constitutional limitations in war time.

It is useless, of course, to address either arguments or remonstrances to the first class.

Perhaps it may be well to remind the second class of the fact that they are most insistent upon the *extremely* strict enforcement of all the constitutional mandates, except those with which they prefer not to be bound. The constitution is in force (and *enforced*) to the letter, insofar as it prescribes fixed terms of office, and grants powers to public officials. It is only disregarded insofar as it *limits* those powers, and defines and guarantees the rights of individuals.

Are we not by thus ignoring our constitutional guarantees, playing directly into the hands of the anarchists?

LEON F. MOSS.

Los Angeles, Cal.

MORE LABELS.

*To the Editor of* LAW NOTES.

SIR: Herewith is a list of Labels to add to your collection as published in your January issue.

*Benefits of Bankruptcy.*

"Assignments of Creditors to Benevolent Ass'ns." Vol. 3, A. & E. Encyc. Law.

*Arson.*

"Benzine to Building Associations." Vol. 4, A. & E. Encyc. Law.

*Very Needful.*

"Partition Fences to Private Property." Vol. 22, A. & E. Encyc. Law.

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"Maim to Meander." Vol. 14, A. & E. Encyc. Law.

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"Take to Tickets and Fares." Vol. 25, A. & E. Encyc. Law.

*More Blessed to Give.*

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"Payments to Powers." Vol. 18, A. & E. Encyc. Law.

*Tell it to the Kaiser.*

"Improvements to International Offense." Vol. 22 Cyc.

F. W. NISBET, *Librarian.*

Houston, Tex.

*To the Editor of* LAW NOTES.

SIR: Apropos of "A Few Labels in LAW NOTES for Jan. '18, and for a few more, see the following volumes of your Enc. of Pleading and Practice:

Vol. 7. "Disorderly Conduct to Escape."

Vol. 14. "Merits to Obscene Language."

Vol. 17. "Prosecuting Attorneys to Reformation."

A reprehensible layman friend of mine on reading the last mentioned in this office not long since exclaimed "Impossible."

H. H. RUMBLE.

Norfolk, Va.

*To the Editor of* LAW NOTES.

SIR: As an addition to your humorous labels in "Obiter Dicta" may I offer the following:

*The Forger's Weakness.*

"Attachment to Bank Paper." 6 Corpus Juris.

*Germany's Strong Point.*

"Improvements to International Offense." 22 Cyc.

*A Consummation Devoutly to be Wished.*

Insurrection to Judges." 29 Century Digest.

*White Slavery.*

"Bonds to Carnal Knowledge." 8 Century Digest.

ERNEST READER.

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"Where the cause and the manner of the happening of a described accident are occult and unintelligible, the accident itself could not have been reasonably forecast or apprehended by the master and does not subject him to liability for negligence. He is not answerable, as being negligent, for an extraordinary result from his conduct." Per Collin, J., in Pyne *v.* Cazenovia Canning Co., 220 N. Y. 130.

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**Is there a presumption that a letter duly mailed is received by the addressee?**

**Is there a similar presumption in case of a telegram?**

See the notes on pages 1058 and 1081 respectively.

**When the right of an electric company to maintain poles and wires in the streets expires, what can be done about it?** See the note on page 525.

**What is a sufficient notice of a special meeting of stockholders?** See the note on page 1004.

**Can a public service commission make a test order?** See the note on page 794.

**Is a Sunday or holiday to be included or excluded in computing time?** See the note on page 934.

**Is a dealer in automobiles who purchases cars outright from the manufacturer an agent of the latter?** See the note on page 568.

**May a newspaper cartoon be libelous?**

**Is it libelous to speak ill of the dead?**

See the notes on pages 190 and 234 respectively.

**Is the authority of an agent revoked by the death of the principal?** See the note on page 380.

**May an accused person waive preliminary examination?** See the note on page 179.

**If a person is injured during a public celebration, is the committee in charge of the affair liable in damages?** See the note on page 238.

**How has the Uniform Warehouse Receipts Act been construed?** See the note on page 29.

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